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Supreme Court, U.S.
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No. 08-291

IN THE

SUPREME COURT

OF THE UNITED STATES

RISCHON DEVELOPMENT CORPORATION,

Petitioner,

vs.

CITY OF KELLER, TEXAS

Respondent.

PETITION FOR REVIEW ON A WRIT OF CERTIORI OF RISCHON DEVELOPMENT CORPORATION

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ISSUES PRESENTED FOR REVIEW

ISSUE ONE

Is the Fort Worth Court of Appeals' Creation of an Unfettered "Safe-Harbor" Allowing Local Governments to Avoid the *Nollan and Dolan* Restrictions Upon Local Governments Unconstitutional?

ISSUE TWO

Is the Fort Worth Court of Appeals' Expansion of the Trial Court's Conclusion of Law That Rischon Consented to Only a Few of the Exactions to Provide Keller Additional "Consent" Relief Unconstitutional?

No. _____

IN THE

SUPREME COURT

OF THE UNITED STATES

RISCHON DEVELOPMENT CORPORATION,

Petitioner,

vs.

CITY OF KELLER, TEXAS

Respondent.

Identity of Parties and Counsel

Pursuant to U.S. Sup. Ct. Rule 14.1(b), Petitioner Rischon Development Corporation certifies that the caption of the case contains the name of all parties, and the following is a complete list of the parties, attorneys, and other persons with a financial interest in the outcome of this lawsuit:

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This corporation is privately-held and does not have a parent corporation. No parent corporation or publicly-held company owns more than 10% of this corporation's stock that would require identification pursuant to U.S. Sup. Ct. Rule 29.6.

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IN THE

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OF THE UNITED STATES

RISCHON DEVELOPMENT CORPORATION,

Petitioner,

vs.

CITY OF KELLER, TEXAS,

Respondent.

PETITION FOR REVIEW ON A WRIT OF CERTIORI OF RISCHON DEVELOPMENT CORPORATION

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner Rischon Development Corporation ("Rischon" or "Petitioner"), submits this Petition for Review on a Writ of Certiori. Respondent City of

Keller, Texas will be referred to as "Keller" or "Respondent."

CITATION TO OPINION

The Opinion of the Fort Worth Court of Appeals, Appellate Cause No. 2-06-103-CV, styled *Rischon Development Corp. v. City of Keller*, will be referred to as the "Opinion," and is located at Appendix A. The official citation to the Opinion is *Rischon Dev. Corp. v. City of Keller, Texas*, 242 S.W.3d 161 (Tex. App.—Fort Worth 2007, pet. denied). The Texas Supreme Court denied Rischon's Petition for Review on March 29, 2008.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction over this proceeding under 28 U.S.C. § 1257(a) because Rischon's rights under the Fifth and Fourteenth Amendments to the United States Constitution have been violated.

Pursuant to U.S. Sup. Ct. Rule 14(e), the following judgments/orders were entered:

January 10, 2006	Final Judgment
November 29, 2007	Judgment of Court of Appeals
December 20, 2007	Order of Court of Appeals Denying Motion for Rehearing
March 29, 2008	Petition for Review Denied by Texas Supreme Court

CONSTITUTIONAL PROVISIONS APPLICABLE TO THIS CASE

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. amend. V.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Nature of the Case.

Rischon was the developer/owner of a subdivision located in Keller, Texas. At trial, Keller's City Manager admitted that Rischon was required to perform Keller's requirements/exactions to obtain Keller's approval and permits. (App. 8, RR5 94) Keller enacted an Ordinance specific to Rischon's property and forced Rischon to agree to exactions in a Developer's Agreement. Keller refused Rischon's requests to remove Keller's exactions.

B. Rischon's Federal Constitution Arguments in the Texas State Courts.

1. Fifth Amendment Issue:

The Fifth Amendment issue was discussed extensively at the trial court level by Rischon's counsel. Page 1 of Rischon's Plaintiff's Brief cites *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620 (Tex. 2004), which extensively discusses

the federal constitution standard regarding Fifth Amendment taking of property as set forth in this Court's *Nollan* and *Dolan* opinions. (App. 3, Plaintiff's Brief, CR200) On page 2, Plaintiff's Brief states "[t]his is most certainly a Flower Mound case, and, as such, is one by which the Texas Supreme Court has incorporated into Texas the rules with regards to analysis of the viability of municipal exactions based upon the Dolan case . . .." (App. 3, Plaintiff's Brief, CR201) After a short discussion of the relationship between the Texas and federal standard as discussed in Flower Mound, the brief states at the bottom of page 2 "[a]t a minimum, the Dolan rule applies." (App. 3, Plaintiff's Brief, CR201) The *Flower Mound* opinion is attached to Plaintiff's Brief.

Rischon's Appellant's Brief devoted the first two of the three issues presented to the federal

constitution question. (App. 4, Rischon's Appellant's Brief Excerpts) Rischon's Reply Brief also discussed the consent issue. (App. 5, Rischon's Appellant's Reply Brief)

In its Opinion, the Fort Worth Court of Appeals analyzed Rischon's exactions claim under the *Flower Mound* methodology, noting that *Flower Mound* in turn cites to *Dolan*. (App. 2, Opinion p. 11). Nonetheless, the Fort Worth Court of Appeals also wrote that it was considering Rischon's claims under the Texas Constitutional standard rather than the U.S. Constitution standard. (App. 2, Opinion p. 11 n. 2) Rischon filed a Motion for Rehearing in the Fort Worth Court of Appeals on December 17, 2007. (App. 6, Motion for Rehearing) The Motion for Rehearing argues that Rischon's citations to appellate opinions that discuss and interpret the U.S. Constitution are sufficient to raise the federal *Nollan/Dolan* standard.

Finally, Rischon's Petition for Review filed in the Texas Supreme Court also complained that Keller's actions violated *Flower Mound*, and thus federal constitutional law. (App. 7, Excerpts From Rischon's Petition for Review).

2. Fourteenth Amendment Issue:

Rischon's Petition for Review filed in the Texas Supreme Court also complained "The Court of Appeals Erred When it Modified/Reversed a Conclusion of Law to Provide Keller Additional Relief Because There is Some Evidence to Support the Trial Court's Refusal to Apply Keller's Consent Defense to Six of the Requirements/Exactions." (App. 7, Excerpts From Rischon's Petition for Review p. 12).

SUMMARY OF ARGUMENT/ STATEMENT OF FACTS

A. Summary of Argument.

In Texas, there is now a new methodology for the wholesale avoidance of this Court's opinions in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). When a local government wishes to require a developer such as Rischon to provide improvements, donate land and pay fees, all the local government needs to do is require the developer to include the items in an ordinance request or Developer Agreement, even if the *Nollan/Dolan* test is unsatisfied. (Opinion at 16; App. A) This violates the Fifth Amendment of the United States Constitution and eviscerates the *Nollan/Dolan* test.

Second, the Fort Worth Court of Appeals has effectively held it may modify Findings of Fact/Conclusions of Law ("FOF/COL") even if not

erroneous as a matter of law. It is undisputed the trial court, per the FOF/COL (App. 1, CR11), found consent solely on two of the Keller requirements/exactions, the roadway impact fees and the park fees. (App. 2, Opinion p. 15). Nonetheless, the Court of Appeals reversed the FOF/COL to provide additional relief to Keller (a finding of consent on all of the requirements/exactions), despite the admissions by Keller's City Manager, Lyle Dresher, that "Rischon was required to do these things to obtain the City's approval and the building permits." (App. 8, RR5 94) This violates the Fourteenth Amendment of the United States Constitution.

B. Keller's City Manager Admitted That Keller Imposed "Requirements" Upon Rischon as a Condition to Keller's Approval.

Rischon developed a 23-lot residential subdivision in Keller. (RR2 37, 39) During the first

three days of trial, there was detailed testimony regarding the various requirements that Keller imposed upon Rischon as conditions for Keller's approval. On the fourth day of trial, Rischon called Mr. Lyle Dresher, who had been present for the previous testimony and was Keller's City Manager for ten years, to testify and make admissions on behalf of Keller. (App. 8, RR5 93-94) Dresher, and thus Keller, admitted that to obtain Keller's approval and building permits for the subdivision, Rischon was required to pay/provide the "park zone dedication fees, dedication of land for private parks, street roadway impact fees, the hike and bike trail, the sidewalk fee for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-iron perimeter fence as well as the utility issues." (App. 8, RR5 94) John Hawkins, Rischon's President, testified Rischon was told by Keller that if Rischon did not perform Keller's

requirements, Rischon would not receive its permits. (RR2 129; RR4 9)

Keller's documents also establish the admissions made by Keller at trial. On February 2, 1999, Keller enacted Ordinance No. 938, zoning Rischon's subdivision and addeing various non-zoning requirements, such as fencing, a sidewalk escrow fee, hike/bike trail and residential fire sprinkler systems for all residences. (JX27) On March 21, 2000, Keller enacted Resolution 1375, approving a Development Agreement with Rischon that obligated Rischon to pay for sewer main extensions and improvements, street and drainage improvements and sidewalks. (JX20) The Development Agreement also obligated Rischon to Pay Keller a sidewalk escrow fee for a future sidewalk on Davis Blvd., a park fee and a roadway impact fee. (JX20)

C. Because Keller Did Not Make an Individualized Determination, Keller Failed the "Rough Proportionality" Test, Making Keller's Actions a "Compensable Taking."

Further, Dresher, and thus Keller, admitted that Keller did not make any individualized determinations as to Rischon's subdivision, Rolling Wood. (App. 8, RR5 96) Local governments are required to make an individualized determination as a basis for satisfying the "rough proportionality" requirement adopted by the United States Supreme Court in its *Nollan* and *Dolan* opinions. As a result, Keller's actions are a "compensable taking."

D. Rischon Did Not Consent to Keller's Requirements/Exactions.

Dresher, and thus Keller, admitted that for Rischon to obtain Keller's approval and building permits for the subdivision, Keller required the "park zone dedication fees, dedication of land for private parks, street roadway impact fees, the hike and bike

trail, the sidewalk fee for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-iron perimeter fence as well as the utility issues." (App. 8, RR5 94) Similarly, John Hawkins, Rischon's President, testified Rischon was told by Keller that if Rischon did not build Keller's utilities for free and perform the other requirements, Rischon would not receive its permits. (RR2 129; RR4 9) Requiring a developer such as Rischon to provide improvements, pay fees and donate land to obtain Keller's approval/permits is not consent.

Additionally, even if Rischon somehow did consent to the two requirements/exactions found by the trial court, and not all of the requirements as modified by the Court of Appeals, guidelines are needed for all developers and local governments across all of Texas. Frankly, taking into account the economic pressures upon a developer that needs

government approvals to construct a project, under what circumstances may there be an effective consent? Rischon argues that the best-reasoned approach would allow a consent only if the requirement/exaction also meets the constitutional requirements.

ARGUMENT

ISSUE ONE

(Restated)

Is the Fort Worth Court of Appeal's Creation of an Unfettered "Safe-Harbor" Allowing Local Governments to Avoid the *Nollan and Dolan* Restrictions Upon Local Governments Unconstitutional?

ARGUMENT AND AUTHORITIES FOR ISSUE ONE

A. If a Legislative Mandate Requiring Consent is Unconstitutional, Then a Local Government Requiring "Consent" to Obtain Regulatory Approvals is also Unconstitutional.

In 1982, this Court invalidated a New York law requiring owners of apartment buildings to permit cable television companies to install cable wires and boxes on their premises. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). If this type of legislation requiring consent is unconstitutional, then surely a requirement of consent by a developer

so the developer can obtain the needed approvals and permits from the local government is also unconstitutional.

B. Under *Dolan* and *Perry*, the Government May Not Require a Developer to Give the Right to Receive Just Compensation Under these Circumstances.

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (U.S. 1994) (cit. omitted). Officials cannot exact a waiver as an end-round "to 'produce a result which it could not command directly.'" *Perry v. Sindermann*, 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972).

As it stands now, when a local Texas government, such as the City of Keller, wishes to require a developer such as Rischon to donate land, pay fees and make uncompensated improvements to obtain local government approval, all the local government needs to do is require the developer to include the items in an ordinance request or Developer Agreement. (App. 2, Opinion p. 16) The Court of Appeals held Rischon's complaints to all levels of the bureaucracy, including requests to modify the ordinance and Developer's Agreement, may be refused, as the developer has somehow "consented."

Dresher (Keller's City Manager), and thus Keller, admitted that for Rischon to obtain Keller's approval and building permits for the subdivision, Keller required the "park zone dedication fees, dedication of land for private parks, street roadway impact fees, the hike and bike trail, the sidewalk fee

for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-iron perimeter fence as well as the utility issues." (App. 8, RR5 94) How is this consent?

It is unconstitutional for a local government to require a developer to perform exactions and enter into an agreement so the developer may obtain the needed approvals and permits from the local government. Further, there is no consent if the developer complains both before and after being forced to enter into the agreement.

Further, Mr. Ilschner (Keller's engineer) stated that if Rischon refused to make the utility improvements, Keller would not issue permits. (RR2 186) In addition, a Jan. 4, 2000 letter from Keller's attorney, Mr. Lowry, ***responding to Rischon's complaints***, admits Keller required Rischon to "construct a sanitary sewer from north of the development all the

way through the development to a point [south] along Bandit Trail. (JX42[1], Jan. 4, 2000 Lowry Letter p. 1) Mr. Lowry's letter also states that "[a]t the request of the City of Keller . . . the developer will construct approximately 480 L.F. of offsite 8" sanitary sewer line from the southeast property line to Bandit Trail." (JX42, Jan. 4, 2000 Lowry Letter p. 2)

Similarly, the Planning and Zoning Commission added the hike/bike trail and sidewalk escrow fee requirements after first denying the proposed zoning change request that did not include these requirements. (JX29, Planning and Zoning Commission Minutes pp. 4-6) Also, the sidewalks were not in Rischon's original plans approved by the City Council, but Keller subsequently added this requirement. (RR2 155-56) Keller admitted the

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1 It should be noted this is a "Joint Exhibit," not solely Plaintiff's Exhibit, containing an admission by Keller that Rischon was disputing Keller's actions. It also predates the March 2000

residential fire sprinklers requirement was a "request" by the Keller Fire Chief. (PX2, N. Zolghradi Jan. 7, 1999 Memo to P&Z Commission p. 2) The perimeter fence requirement was added by Keller at a Keller public hearing. (RR2 177)

C. Consent Should Not Be Permitted When the Exactions are Unconstitutional.

The Washington Supreme Court has held the "county's park development fees were lawful under statute if the fees were imposed pursuant to a **voluntary agreement**, and were reasonably necessary as a direct result of the proposed development or required to mitigate the direct impact of the development." *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187, 189-190 (Wash. 1994)). It makes sense to Rischon that if consent is to be permitted under limited circumstances, the requirement/exaction must first meet the two-part

---

Developer's Agreement.

Nollan/Dolan test. Otherwise, the "safe-harbor" created by the Fort Worth Court will have no limits. Additionally, there can be no consent if the "consent" is not voluntary.

ISSUE TWO

(Restated)

The Court of Appeals Erred When it Modified/Reversed a Conclusion of Law to Provide Keller Additional Relief Because There is Some Evidence to Support the Trial Court's Refusal to Apply Keller's Consent Defense to Six of the Requirements/Exactions.

ARGUMENT AND AUTHORITIES FOR ISSUE TWO

The Fourteenth Amendment requires that citizens receive equal protection under state law. U.S. Const. amend. XIV, § 1. In Texas, Courts of Appeals are permitted to modify a trial court's conclusions of law only if there is no evidence to support the conclusion of law. There is some evidence Rischon did not consent, including the admission of Keller that it required Rischon to perform the

requirements/exactions to obtain Keller's approvals and permits (App. 8 RR5 94), and also the latter from Keller's counsel responding to Rischon's complaints. (JX42) Therefore, Rischon did not receive "equal protection" when the Court of Appeals expanded the trial court's conclusion that Rischon consented to the remaining six requirements/exactions.

A. Appellate Review of Trial Court's Conclusions of Law – Legal Sufficiency.

"Appellate courts review a trial court's conclusions of law as a legal question." *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002) (cit. omitted). A trial court's conclusions of law are reviewed de novo, and are upheld unless they are erroneous as a matter of law. *See State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1999). Stated another way, challenges to a trial court's conclusions of law may not be made for factual insufficiency. *BMC Software Belg., N.V.*, 83 S.W.3d at 794.

B. There is Evidence, Including the Admissions of the Keller City Manager That Rischon Was Required to Agree to the Exactions to Obtain Keller's Approval, to Support the Trial Court's Refusal to Find "Consent" to All of the Requirements/Exactions.

On the fourth day of trial, Rischon called Mr. Lyle Dresher, who had been present for the previous testimony and was Keller's City Manager for ten years, to testify and make admissions on behalf of Keller. (App. 8, RR5 93-94) Dresher, and thus Keller, admitted that to obtain Keller's approval and building permits for the subdivision, Rischon was required to pay/provide the "park zone dedication fees, dedication of land for private parks, street roadway impact fees, the hike and bike trail, the sidewalk fee for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-iron perimeter fence as well as the utility issues." (App. 8, RR5 94) Similarly, John Hawkins, Rischon's President, testified Rischon was

told by Keller that if Rischon did not build Keller's utilities for free and perform the other requirements, Rischon would not receive its permits. (RR2 129; RR4 9)

The trial court refused to apply Keller's consent defense to six of the requirements/exactions. (App. 1, FOF/COL and Supp. FOF/COL) The Court of Appeals is permitted to modify this Conclusion of Law only if Keller's consent defense was established as a matter of law. Because there is some evidence that Rischon was required to perform the requirements to obtain Keller's approval, and thus some evidence that Rischon did not consent, the Court of Appeals erred when it modified/reversed the Conclusion of Law and expanded the consent defense to include all requirements/exactions.

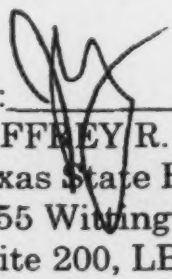
PRAYER

For all the reasons stated in this brief, Petitioner Rischon Development Corporation asks

that this Court reverse the judgment of the trial court and render judgment in favor of Petitioner Rischon Development Corporation, or, in the alternative, remand this cause for further proceedings.

Respectfully submitted,

Shamoun & Norman, L.L.P.



By:_____

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COUNSEL FOR PETITIONER
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CORPORATION

CERTIFICATE OF SERVICE

The undersigned certifies that three true and correct copy of the foregoing instrument were served by certified mail, return receipt requested, on 28th day of August, 2008, upon:

Via CMRRR:

S.G. Johndroe, III, Esq.
Cantey & Hanger, LLP
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Jeffrey R. Sandberg

APPENDIX

Appendix 1	Judgment and Findings of Fact/Conclusions of Law:
CR244	Final Judgment (Jan. 10, 2006)
CR265	Supplemental/Corrected Findings of Fact/Conclusions of Law (March 15, 2006)
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JUDGMENT

On October 17, 2005, this cause came on for trial without a jury before the undersigned Judge on the issue of liability only. By agreement of the parties and by order of this Court in open court, the issues of liability and damages have been bifurcated. Both parties appeared and were represented by their attorneys of record and announced ready for trial. All matters of controversy, legal and factual, were submitted to the Court for its determination. The Court, after examining the pleadings, hearing the evidence, and arguments, announced its decision for the Defendant and that Plaintiff should take nothing.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that in this cause of action judgment be entered for Defendant, the City

of Keller, Texas, and that Plaintiff, Rischon Development Corp., take nothing by its suit.

SIGNED on this 10th day of January, 2006.

_____

Judge Fred Davis

SUPPLEMENTAL/ CORRECTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court states and files the following Supplemental/Corrected Findings of Fact and Conclusions of Law:

1. Rischon built three (3) sewer line extensions, 993 feet, 831 feet and 400 feet, respectively, in length.

2. Rischon built a water line extension of 362 feet.

3. Conclusion of Law No. 5 is modified so that the statement "[a]ny evidence to the contrary is not credible" is deleted.

ENTERED this 15 day of March, 2006.

_____

PRESIDING JUDGE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to Plaintiff Rischon Development Corp.'s request, the Court states and files following findings of fact and conclusions of law:

Findings of Fact

1. Rischon is a Texas Corporation and John Hawkins is the president of Rischon.

2. The City is a home-rule municipality within the state of Texas.

3. Rischon was the developer of the Rolling Wood subdivision within the City (19.37 acres, legally described as Block A, Lots 1-23, Block B, Lot t, and Block C, Lot 1, of the Rolling Wood Subdivision, City of Keller, Tarrant County, Texas)("Rolling Wood").

4. The Rolling Wood property had remained vacant ever since it was annexed into the City in

the 1960's. The Rolling Wood Property had many difficulties that discouraged development by making development risky and difficult such as hills creating dramatic topographical changes, heavily wooded area, and a creek in an approximately ten foot deep ravine at the front of Rolling Wood preventing access from Davis Blvd.

5. In December 1998, Rischon applied for rezoning of the property that would become Rolling Wood subdivision.

6. Prior to the rezoning application, Rischon met with City Staff to discuss his proposed development.

7. At the time of the rezoning application in December 1998, Rolling Wood was zoned residential, minimum 36,000 square feet lots. The Future Land Use plan for the City intended to have

the back (eastern) portion of the property zoned residential, minimum 20,000 square feet lots, and the area of the property along Davis Blvd, zoned retail.

8. In Rischon's zoning application, Rischon proposed, in relevant part, the following:

a. A gated entrance, and a private subdivision with private streets, perimeter fencing, and private land maintained by the residents of Rolling Wood through a homeowners association;

b. Reducing the minimum lot size to 14,100 square feet;

c. Construction of 0.9 miles of five foot asphalt hike/bike trails connecting all common areas;

d. No internal sidewalks.

e. Wrought iron fencing along front of the property;

f. Chain link fence around the perimeter of the property;

g. Private streets built to Keller standards;

h. Construction of a 6" water line from Davis Blvd. and tied into the existing 6" water line north of Bandit Trail, for the purpose of serving Rolling Wood residents;

i. Construction of a 10" offsite sewer line from the Trinity River Authority line approximately 1010 ft. away to Rolling Wood, and Rischon requested participation in the Sanitary Sewer

Main Line Extension Policy (Keller Resolution No. 995.) to assist with costs of the 10" offsite sanitary sewer line because that line exceeded 1000 ft.;

j. Construction of an onsite 8" sewer line necessary provide sewer service for Rolling Wood residents;

k. The onsite 8" sanitary sewer lines will be extended to the southwest and southeast corners of Rolling Wood to provide for future development to the south; and

l. Rischon will construct a 480 ft. offsite 8" sewer line from the southeast property line of Rolling Wood to Bandit Trail for which the City of

Keller will reimburse Rischon for the cost associated with its construction.

9. In order to mitigate the affect of smaller lot sizes, Rischon proposed a private open space area behind the residences enclosed by the perimeter fence. The open space would have extensive hike/bike trails as well as a pond. The open space would be accessible only to the residents of Rolling Wood.

10. Citizens of the City objected to the increased density caused by the proposed rezoning at the public hearings at the Planning and Zoning Commission ("Commission") and City Council. At the hearing on January 11, 1999, the Commission denied Rischon's request for rezoning. In addition, at the meeting City staff recommended that internal sidewalks be constructed at Rolling Wood

and that sidewalks be constructed along Davis Blvd or that the cost of the sidewalk on Davis Street be escrowed for future construction. The City's Fire Chief recommended, pursuant to his authority under the City Fire Code, that residential fire sprinkler systems be placed in the houses at Rolling Wood due to the restricted access at Rolling Wood. Rischon consented to both of the staff's recommendations.

11. On February 2, 1999, at the City Council meeting, a number of citizens spoke out against the rezoning of Rolling Wood. Rischon's proposed development plan was approved with the City Staff's recommendations, and Rolling Wood was rezoned on February 2, 1999, to Planned Development No. 938 ("PD-938"). Rischon did not object to the rezoning or the staff's

recommendations. The perimeter fence decision was delayed for determination until the preliminary plat hearing.

12. At the time the Rolling Wood rezoning was approved by the City, Rischon did not own or have any ownership interest Rolling Wood. Rischon secured $1.3 million in financing between February 13, 1999, and March 4, 1999. Thereafter, on March 9, 1999, Rischon paid $400,000 to Ina Blevins for Rolling Wood.

13. After zoning was approved, Rischon filed a preliminary and final plat that was reviewed by the Commission and City Council. The preliminary and final plats detail the layout, construction, and design of the development.

14. On April 12, 1999, Rischon's preliminary plat was reviewed by the Commission. On the

preliminary plat, the perimeter fence was proposed to be constructed of wrought iron. The representative of Rischon stated the plan would comply the staff recommendations regarding wrought iron fencing for the perimeter fence. The plat was approved with the recommendations of City staff without any discussion or objection from Rischon. At a hearing on May 4, 1999, the City Council considered the preliminary plat for Rolling Wood, and it was unanimously approved by City Council without objection from Rischon.

15. The final plat was unanimously approved by the City Council on October 19, 1999. Rischon's expectation was to construct what is proposed in PD-938 and the final plat.

16. After the approval of the final plat, the City of Rischon began to work on a Developer's

Agreement in accordance with the approved plans and PD-938.

17. The Developer's Agreement was approved by City Council on March 21, 2000, and thereafter signed by Rischon.

a. Rischon agreed to construct internal sidewalks along right-of-ways that are not fronting lots;

b. Rischon agreed to pay $23,000 in park fees in lieu of dedication of land to public park use;

c. Rischon agreed to pay $34,500 in roadway impact fees;

d. Rischon agreed to construct a sidewalk on Davis Blvd but instead of constructing the sidewalk during the time of development, Rischon

escrowed $8,575 to pay for the cost of constructing the sidewalk in the future;

e. Rischon agreed to construct 400 ft. of 8" offsite water main, extending north of Rolling Wood;

f. Rischon agreed to construct 255 ft. of 10" offsite sewer line and 738 ft. of 8"sewer line to the north of Rolling Wood to connect to the Trinity River Authority sewer main to supply sewer for Rolling Wood;

g. City agreed to reimburse Rischon for the cost of constructing the 6" onsite water line from cul-de-sac within Rolling Wood to the Southeast property line of Rolling Wood;

h. City agreed to reimburse Rischon for the cost of constructing the 6" offsite water line from Rolling Wood property line south to the Bandit Trail area;

i. The City agreed to reimburse Rischon for the cost of constructing the 8" offsite sewer line from the Rolling Wood property line to the Bandit Trail area;

j. The agreed total cost of construction was $500,012.33.

18. On September 1, 2000, Rischon applied for a zoning amendment to change PD-938, requesting, in relevant part, the following things: 1. omit security gates at Rolling Wood along Davis Blvd., 2. omit construction of sidewalk on Davis Blvd. and refund funds escrowed for that purpose, 3.

eliminate construction of internal residential fire sprinklers, 4. reduce length of hike/bike trail from 4,500 feet to 500 feet, 5. change perimeter fence and fence along Davis Blvd. from a wrought iron fence to a wood fence, and 6. eliminate internal sidewalks. On October 9, 2000, the Commission heard Rischon's zoning application and denied it. On November 7, 2000, the City Council heard Rischon's zoning amendment application and denied it.

19. Rischon applied for a second zoning amendment to PD-938 asking to (1) Change Rolling Wood to a public subdivision rather than a private Subdivision; (2) eliminate the perimeter fence all together and build a wrought iron fence only along Davis Blvd.; and (3) reduce the amount of hike/bike trails within Rolling Wood from 4500 to 1300 feet.

Both the Commission and the City Council denied Rischon's second zoning amendment..

20. The completion of the infrastructure for Rolling Wood by Rischon occurred slowly. On January 26, 2001, pursuant to the Developer's Agreement, the City paid Rischon $86,647.00 as reimbursement for Rischon's construction of certain water and sewer lines after the construction of those lines was accepted by the City. On February 8, 2002, Rischon substantially completed all the necessary work and the City released all of the building permits for Rolling Wood.

21. Although Rischon requested in its original proposal to participate in the City's Sanitary Sewer Main Line Extension Policy (Keller Resolution No. 995) ("Extension Policy") when the sewer line from the Trinity River Authority was estimated at 1010

ft., the actual length of the constructed line was less than the minimum set by the City's policy and Rischon was not qualified to participate in the Extension Policy. The Extension Policy allows a developer to be reimbursed for the cost of extending a sewer line to a residential development when the length of any single line exceeds 1000 ft. However, none of Rischon's constructed sewer lines exceeded 1000 feet. The reimbursement consists of compensation paid to a developer when a residence connects to that sewer line within seven years after its construction. The compensation paid to the developer comes from the connection fee that the residence pays to connect to the City's sewer system.

22. After discovering it did not qualify to participate in the Extension Policy, Rischon failed

to request an exception in its case to be permitted to participate in the Extension Policy.

23. Rolling Wood was built with a single dead-end road as access to the property. At the entrance of Rolling Wood, the access road crossed a ravine via a bridge. Rolling Wood is heavily wooded with dramatic topography. The limited capacity of the City Fire Department facilities to address a fire at Rolling Wood created a dangerous situation that required additional fire protections at Rolling Wood.

24. The provisions of PD-938 and other ordinances that applied to Rolling Wood were consistently and uniformly applied to all similarly situated developments in the City. All the regulations contained in PD-938 or other ordinances as applied to Rolling Wood were routine

development regulations necessary to offset the impact of the proposed development.

25. Rischon did not request, under Texas Local Government Code §212.009(e), a certification of reasons for the City's actions in approving the plat of Rolling Wood.

26. Rischon agreed to pay the impact and park fees. Rischon did not request a Variance from the roadway impact or park fees from the City Council . Rischon did not contest or appeal to the City Council the City's determination of the appropriate amount of roadway impact and park fees paid by Rolling Wood.

Conclusion of Law

1. The City's zoning regulations and ordinances at issue and in effect at all times material to this

lawsuit are not arbitrary, unreasonable, or capricious.

2. The City's zoning regulations and ordinances at issue and in effect at all times material to this lawsuit were applied consistently and uniformly.

3. The City's zoning regulations and ordinances at issue and in effect at all times material to this lawsuit were applied equally to all similarly-situated landowners.

4. The City's zoning regulations and ordinances at issue in effect at all times material to this lawsuit were substantially advanced legitimate government interests.

5. The City did not require Rischon to provide or do anything as a condition on the approval of PD-938 and the Rolling Wood development. All of the provisions of PD-938 or the Rolling Wood

development were proposed or adopted by Rischon without objection. Any evidence to the contrary is not credible.

6. Rischon consented to payment of the roadway impact fees or park fees and waived any complaint thereof by agreeing to payment of fees in the Developers Agreement and by failing to contest the City's determination of the appropriate amount and receiving a final decision from the City Council.

7. Before Rischon purchased Rolling Wood, its primary expectations was to comply with the future land use plan and current zoning at Rolling Wood. At the time Rischon bought Rolling Wood, Rischon's primary expectation was to comply with PD-938 and the final plat.

8. The City's decisions did not interfere with any of Rischon's reasonable, investment-backed expectations.

9. The decisions of the City did not have a severe economic impact of Rischon.

10. The City's zoning regulations and ordinances at issue and in effect at all times material to this lawsuit and the City's actions do not constitute a taking under Texas Constitution, Article 1, § 17.

SIGNED AND ENTERED on this 7th day of December, 2005.

_____

Judge Fred Davis

RISCHON DEVELOPMENT CORP., APPELLANT v. CITY OF KELLER, APPELLEE

NO. 2-06-103-CV

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

242 S.W.3d 161; 2007 Tex. App. LEXIS 9443

November 29, 2007, Delivered

SUBSEQUENT HISTORY: Rehearing denied by **Rischon** Dev. Corp. v. City of Keller, 2007 Tex. App. LEXIS 9952 (Tex. App. Fort Worth, Dec. 20, 2007)
Petition for review denied by **Rischon** Dev. Corp. v. City of Keller, 2008 Tex. LEXIS 272 (Tex., Mar. 28, 2008)

PRIOR HISTORY: [**1]
FROM THE 17TH DISTRICT COURT OF TARRANT COUNTY.

CASE SUMMARY
PROCEDURAL POSTURE: Appellant developer sought review of a take-nothing judgment from the 17th District Court of Tarrant County (Texas), which ruled in favor of appellee city on the developer's claim that the city committed an unlawful taking under the Texas Constitution by imposing certain requirements on a residential

development.

OVERVIEW: The developer applied for rezoning of the property as a planned development with certain requirements and features. The city approved the applications with some modifications, including water and sewer extensions, sidewalks, fire sprinkler systems, and a wrought iron fence. The developer raised no objections to these requirements at the city council meeting and consented to some staff recommendations without objection. Moreover, the developer did not object when the city approved the preliminary and final plats. After the city approved the plat, the parties entered into an agreement that specified the developer's responsibilities. The developer did not object to any of the additional requirements until after it signed the agreement. The trial court made conclusions of law that the developer either proposed all of the provisions of the development or adopted them without objection. The court held that the trial court's unchallenged findings of fact supported these conclusions. Because the developer consented to the modifications, within the meaning of Tex. Const. art. I, § 17, there was no unlawful taking.

OUTCOME: The court affirmed the trial court's judgment.

CORE TERMS: sidewalk, plat, trails, landowner's, zoning, fence, feet, sewer, exaction, wrought iron, perimeter, conclusions of law, ordinance, developer, sewer line, consented, sprinkler, hike, bike, build,

reimburse, offsite, roadway, zoning amendment, residential, recommended, staff, staff recommendations, sanitary, fencing

LEXISNEXIS®
HEADNOTES Hide

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > General Overview

H *N* *1* Unchallenged findings of fact are binding on an appellate court unless the contrary is established as a matter of law or there is no evidence to support the finding. A party may not challenge conclusions of law for factual sufficiency, but an appellate court may review conclusions of law to determine their correctness based upon the facts. An appellate court will

uphold a conclusion of law if the judgment can be supported on any legal theory supported by the evidence. Appellate courts review conclusions of law de novo and will not reverse them unless they are erroneous as a matter of law. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN2 See Tex. Const. art. I, § 17.

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > Takings

HN3 Several different general categories of takings claims exist. A distinct category of takings occurs when

the government conditions the approval of permits on an exaction from the approval-seeking landowner. Any requirement that a developer provide or do something as a condition to receiving municipal approval is an exaction. More Like This Headnote

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > Takings

H A landowner may
N ıken or damaged
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y be spoken, acted, or
eadnote

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > Takings

H A landowner who
N objects to city-
5 imposed requirements
at every opportunity
and administrative

level does not consent to a taking by exaction even if the landowner waits to file suit until after receiving permit approval and after performing the complained-of requirements. More Like This Headnote

COUNSEL: FOR APPELLANT: Shamoun Klatsky Norman, LLP, and Jeffrey R. Sandberg, Dallas, TX. Walter W. Leonard, Fort Worth, TX.

FOR APPELLEE: Cantey Hanger, LLP, S.G. Johndroe, III, Scott Fredricks, Fort Worth, TX. Boyle & Lowry, LLP, L. Stanton Lowry, Douglas H. Connor, III, Michael K. Kallas, Irving, TX.

JUDGES: PANEL A: HOLMAN, GARDNER, and MCCOY, JJ.

OPINION BY: ANNE GARDNER

OPINION

[*163] I. Introduction

This is a takings case. Appellant **Rischon** Development Corp. complains that the City of Keller committed an unlawful taking under the

Texas constitution by imposing certain requirements on a residential development planned by **Rischon.** The City contends that **Rischon** consented to all of the requirements. After a bench trial, the trial court rendered a take-nothing judgment on **Rischon's** claims against the City. We affirm.

II. Background

The City of Keller is a home-rule municipality in Tarrant County. **Rischon** is a residential land development company. This dispute concerns a tract of land within the City's limits that **Rischon** developed into the Rolling Wood subdivision.

The property in question comprises 19.37 acres, all within the City. The land includes heavily wooded areas, hills, and a creek flowing through a ten-foot-deep ravine along the only access road, Davis Boulevard. As a result, the land remained undeveloped from the time the City annexed it in the 1960s. Prior to **Rischon's** efforts to develop the property, it was zoned for residential use with lots a minimum of 36,000 **[**2]** square feet.

In 1998--before it purchased the property--**Rischon** met with the City's development staff to discuss the general features of **Rischon's** proposed development. In December 1998, **Rischon** applied for rezoning of the property as a planned development--in other words, it sought zoning that would take into account the unique features of the property with some freedom to propose variances

from the usual ordinance requirements. **Rischon** asked the City to approve a planned development zoning ordinance with the following requirements and features:

1. An entrance with wrought iron gates;

2. A private subdivision with private streets built to City standards but maintained by the residents of Rolling Wood through a homeowners association;

3. Wrought iron fencing along the front of the property with chain-link fencing around the perimeter of the property;

4. Reduction of the minimum lot size to 14,100 square feet;

5. Construction of 0.9 miles of asphalt hike/bike trials connecting all common areas;

6. No internal sidewalks;

[*164] 7. Construction of a six-inch water line from Davis Boulevard and tied into the an existing water line to the south of the property;

8. Construction of a ten-inch offsite sewer **[**3]** line from the Trinity River Authority sewer line to Rolling Wood;

9. Construction of an eight-inch sanitary sewer line with extensions to the southern corners of the property for future development;

10. Construction of 480 feet of eight-inch sanitary sewer line from the southeast corner of Rolling Wood to Bandit Trail--an adjacent, existing development not then served by the City sewer system--for which the City would reimburse all costs; and

11. A private open-space area along the perimeter of the development and surrounding a small pond to mitigate the effect of the smaller lot sizes.

On January 11, 1999, the City's Planning and Zoning Commission considered **Rischon's** proposal. A number of Keller residents testified in opposition to the rezoning, particularly to rezoning the property for lot sizes that were less than half the size of the existing classification. The City fire chief recommended that the City require fire sprinkler systems in the Rolling Wood residences because of the restricted access to the neighborhood. City development staff recommended that, as per City ordinances, the City require **Rischon** to build sidewalks along the interior streets and to escrow the cost of the **[**4]** sidewalk along Davis Boulevard for future construction. **Rischon** consented to both recommendations.

The City Council considered **Rischon's** zoning request on February 2, 1999. **Rischon** did not object to City staff's sidewalk and fire sprinkler recommendations. With those modifications, the

Council approved **Rischon's** application and rezoned Rolling Wood with the following conditions:
1. Installation of wrought iron fencing along Davis Boulevard and the installation of perimeter fencing of a nature to be determined at the preliminary plat stage;

2. Escrow of the Davis Boulevard sidewalk funds;

3. Construction of interior sidewalks;

4. Development of hike and bike trails;

5. **Rischon** to bear the entire cost of providing sanitary sewer service to the development;

6. Residential fire sprinklers in all dwelling units.
Rischon raised no objections to these requirements at the February 2 City Council meeting.

Rischon purchased the Rolling Wood property on March 9, 1999, for $ 400,000.

Rischon submitted a preliminary plat for the Rolling Wood development, and the City's Planning and Zoning Commission reviewed the plat on April 12, 1999. The plat included plans for construction of a wrought iron fence along **[**5]** the entire perimeter of the development. City staff recommended approval of the plat subject to several changes, including a six-foot-high fence along Davis Boulevard. **Rischon's** representative stated that the plat would comply with the staff recommendations concerning the wrought iron

fence. The Planning and Zoning Commission approved the plat with the staff recommendations; again, **Rischon** did not object.

On December 22, 1999, **Rischon's** president, John Hawkins, advised the city by letter that he "deemed it inappropriate that I should bear the cost to extend" the sanitary sewer to Bandit Trail. The City **[*165]** Attorney explained the sewer-extension requirement in a letter to the City Manager, and the City Manager forwarded the explanation to Hawkins. Ultimately, as described below, the City agreed to reimburse and did reimburse **Rischon** for the cost of the offsite Bandit Trail utility extensions.

Notwithstanding its dispute with the Bandit Trail sewer extension, **Rischon** submitted to the City Council a Developer's Agreement outlining the costs of construction, what was required, and how the construction would be carried out. The City Council approved the agreement on March 21, 2000; Hawkins signed **[**6]** it on behalf of **Rischon** on March 22; and City staff signed it by March 23. The City and **Rischon** agreed as follows:
1. **Rischon** agreed to build sidewalks along right-of-ways that did not front lots;

2. **Rischon** agreed to pay $ 23,000 in park fees in lieu of dedicating land for public use;

3. **Rischon** agreed to pay $ 34,500 in roadway impact fees;

4. **Rischon** agreed to escrow $ 8,575 for construction of the Davis Boulevard sidewalk;

5. **Rischon** agreed to build and pay for 400 feet of offsite water main extending north of Rolling Wood;

6. **Rischon** agreed to build and pay for 255 feet of ten-inch offsite sewer line and 738 feet of eight-inch sewer line running to the north to connect to the Trinity River Authority sewer main;

7. The city agreed to reimburse **Rischon** for the cost of constructing a six-inch onsite water line to the southeast corner of the development;

8. The City agreed to reimburse **Rischon** for the cost of constructing a six-inch offsite water line from Rolling Wood to Bandit Trail;

9. The City agreed to reimburse **Rischon** for the cost of constructing the eight-inch sewer line from Rolling Wood to Bandit Trail;

10. The City agreed to release 10% of the building permits for Rolling Wood when **[**7]** the City accepted the development's water, sewer, drainage, and street facilities; and

11. The City agreed to issue building permits for all lots after the final acceptance of Rolling Wood.

On March 28, 2000, **Rischon** sent a letter to the City requesting changes to the February 2, 1999

rezoning ordinance. **Rischon** wanted (1) to participate in the city's Water & Sanitary Sewer Main Extension Policy, which would have offset the cost of some of the utility extensions; (2) the return of the $ 8,575 escrowed for the Davis Boulevard sidewalk; (3) to not be required to install an entry gate to Rolling Wood and thus be excused from installing fire sprinkler systems on the lots within 600 feet of Davis Boulevard; (4) to change the hike and bike trails from those approved on the plat; (5) to change the landscaping around the pond; (6) to construct a wood fence behind certain lots; and (7) to increase the minimum square footage of homes from 2,400 square feet to 3,000 square feet. The City told **Rischon** that it needed to apply for a zoning amendment because all of the requested changes were changes to the zoning ordinance.

On September 1, 2000, **Rischon** applied for a zoning amendment, requesting the **[**8]** same changes as in its March 28, 2000 letter. The City's Planning and Zoning Commission heard the application on October 9 and recommended denial, and the **[*166]** City Council heard and denied the application on November 7.

In the spring of 2001, **Rischon** filed a second zoning amendment application, requesting (1) to replat Rolling Wood as a public subdivision rather than a private subdivision, (2) to eliminate the perimeter fence in its entirety and build a wrought iron fence along Davis Boulevard only, and (3) reduce the length of the hike and bike trails within Rolling Wood. On May 14, 2001, the Planning and

Zoning Commission recommended denial, and the City Council denied the application on June 5.

On January 26, 2001, the City reimbursed **Rischon** for the construction of certain offsite water and sewer lines, including the Bandit Trail lines, as per the Developer's Agreement and released 10% of the Rolling Wood building permits. On February 22, 2001, **Rischon** completed the water, sewer and drainage facilities at Rolling Wood. By February 8, 2002, **Rischon** substantially completed all the necessary work required by the February 22, 1999 zoning amendment, and the City released all of the building **[**9]** permits for Rolling Wood.

Rischon sued the City on July 15, 2002, alleging that the water and sewer extensions, fencing, sidewalks, and fire sprinkler systems required by the February 1999 zoning ordinance constituted a taking under the Texas constitution. The parties tried the case to the bench. The trial court made findings of fact and conclusions of law, including findings and conclusions that **Rischon** consented to, proposed, or adopted without objection the provisions of the February 1999 zoning ordinance and the Development Agreement. The trial court rendered a take-nothing judgment, and **Rischon** filed this appeal.

III. Discussion

In three issues, **Rischon** argues that, as a matter of law, the requirements imposed by the City on

Rolling Wood were compensable takings in the form of exactions. In reply, the City argues that **Rischon** consented to all of the requirements. [1]

FOOTNOTES

1 The City also argues that **Rischon** lacks standing to assert a takings claim because it purchased the property after the City approved **Rischon's** zoning request. But as the City acknowledges, some of the requirements **Rischon** identifies as exactions--for example, the roadway impact fees--did not arise until after **Rischon** **[**10]** purchased the property. Thus, even if the City's standing argument has merit, it is not a bar to all of **Rischon's** claimed exactions.

A. Standard of review

The trial court made findings of fact and conclusions of law. Although **Rischon** recites the factual sufficiency and legal sufficiency standards of review in its brief, it does not specifically challenge any of the trial court's findings of fact; it does, however, challenge several of the conclusions of law as supported by no evidence or contrary to the great weight and preponderance of the evidence.

HN1[↑] Unchallenged findings of fact are binding on an appellate court unless the contrary is established as a matter of law or there is no evidence to support the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986); *Raman Chandler Props., L.C. v. Caldwell's Creek Homeowners Ass'n, Inc.*, 178 S.W.3d 384, 390 (Tex. App.--Fort Worth 2005, pet. denied). A party may not challenge conclusions of law for factual sufficiency, but we may review conclusions of law to determine their correctness based upon the facts. *Citizens Nat'l Bank v. City of Rhome*, 201 S.W.3d 254, 256 (Tex. App.--Fort Worth 2006, no pet.); *Dominey v. Unknown Heirs and Legal Representatives* [*167] *of Lokomski*, 172 S.W.3d 67, 71 (Tex. App.--Fort Worth 2005, no pet.).

We [**11] will uphold a conclusion of law if the judgment can be supported on any legal theory supported by the evidence. *Tex. Dep't of Public Safety v. Stockton*, 53 S.W.3d 421, 423 (Tex. App.--San Antonio 2001, pet. denied). We review conclusions of law de novo, *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996), and we will not reverse them unless they are erroneous as a matter of law. *Stockton*, 53 S.W.3d at 423.

B. **Consent**

The takings clause of the Texas constitution prohibits the State from taking private land for public use without compensation or consent:

HN2 No person's property shall be taken, damaged or destroyed for, or applied to public use without adequate compensation being made, *unless by the consent of such person.*

TEX. CONST. art. I, § 17 (emphasis added). [2] HN3 Several different general categories of takings claims exist. A distinct category of takings occurs when the government conditions the approval of permits on an exaction from the approval-seeking landowner. *Town of Flower Mound v. Stafford Estates, L.P.*, 71 S.W.3d 18, 30 (Tex. App.--Fort Worth 2002) *("Flower Mound I"), aff'd,* 135 S.W.3d 620 (Tex. 2004) *("Flower Mound II")* (citing *Dolan v. City of Tigard*, 512 U.S. 374, 377, 114 S. Ct. 2309, 2312, 129 L. Ed. 2d 304 (1994)). **[**12]** Any requirement that a developer provide or do something as a condition to receiving municipal approval is an exaction. *Flower Mound II*, 135 S.W.3d at 625.

FOOTNOTES

2 Although **Rischon** contends in its first and second issue statements that it established a taking "under federal law," nowhere in its brief does it cite or even mention the federal constitution; nor did it allege a taking under the federal constitution in its trial court pleadings. And in a trial court brief, **Rischon** specifically stated, "[W]e are in fact litigating based upon the

Texas Constitution . . . ." Therefore, we construe **Rischon's** claims to allege a taking under the Texas constitution only.

HN4 A landowner may consent to property being taken or damaged without payment of any compensation. TEX. CONST. art. I, § 17; *Hale v. Lavaca County Flood Control Dist.*, 344 S.W.2d 245, 248 (Tex. Civ. App.--Houston 1961, no writ). Consent is an act of the will; it need not be written, but may be spoken, acted, or implied. *Hightower v. City of Tyler*, 134 S.W.2d 404, 407 (Tex. Civ. App.--El Paso 1939, writ ref'd).

HN5 A landowner who objects to city-imposed requirements at every opportunity and administrative level does not consent to a taking by **[**13]** exaction even if the landowner waits until after receiving permit approval and after performing the complained-of requirements. *Flower Mound I*, 71 S.W.3d at 28. In *Flower Mound*, a landowner sought to develop land within the town of Flower Mound. *Id.* at 25. As a condition of plat approval, the town required the landowner to rebuild a road abutting the project at the landowner's sole expense in accordance with a town ordinance. *Id.* The landowner sought an exemption from the ordinance and objected to the road-improvement requirement "at every level within the Town." *Id.* The landowner sued the town after the town approved its plat and after the landowner rebuilt the road. *Id.* The town argued that the

landowner waived its takings claim by failing to file suit before the town approved the plat and by accepting the benefit received in exchange for the exaction, namely, approval of its plat. *Id.* at 27. Rejecting the town's waiver **[*168]** argument, we emphasized that the landowner "did unsuccessfully object to the [road] improvements condition at every administrative level within the Town." *Id.* at 28. The supreme court likewise rejected the municipality's argument, also noting that "as the parties **[**14]** stipulated, [the landowner] objected to the condition at every opportunity, and the [town] was well aware of [the landowner's] position. *Flower Mound II*, 135 S.W.3d at 630; *see also Sefzik v. City of McKinney*, 198 S.W.3d 884, 895 (Tex. App.--Dallas 2006, no pet.) (rejecting city's waiver and estoppel defenses when developer objected to the condition imposed for plat approval at every administrative level).

This case is unlike *Flower Mound* and *Sefzik* because **Rischon** did not object at "every opportunity" and "every administrative level" to the requirements it now identifies as exactions. To the contrary: **Rischon** raised no objections to the requirements of which it now complains until after the City approved the plat and after **Rischon** and the City entered into the Developer's Agreement.

Rischon identifies eight "requirements" that it claims are exactions: (1) the utility line extensions; (2) the park zone dedication fee in lieu of park land dedication; (3) the roadway impact fees; (4) the hike and bike trails; (5) the money escrowed for the

Davis Boulevard sidewalk; (6) the sidewalks within the subdivision; (7) the residential fire sprinklers; and (8) the wrought iron perimeter fence. **Rischon's [**15]** own 1998 zoning application requested approval of the hike and bike trails and the wrought iron fence along the front of the property. When City staff recommended internal sidewalks, a sidewalk on Davis Boulevard, and residential fire sprinklers, **Rischon** did not object, and the trial court found that **Rischon** consented to these recommendations. When the City Council considered and approved the zoning application with the addition of the staff recommendations, **Rischon** did not object.

When **Rischon** submitted its preliminary plat to the Planning Commission, it stated that it would comply with staff recommendations for a wrought iron perimeter fence. **Rischon** did not object when the City approved the preliminary and final plats including the wrought iron perimeter fence.

After final approval of its plat, **Rischon** did object to paying for the extension of utilities to Bandit Trail. But the City ultimately agreed to pay and did pay for those extensions.

After the City approved the plat, **Rischon** negotiated and entered into the Developer's Agreement with the City on March 21, 2000. In the agreement, **Rischon** agreed to build internal sidewalks, pay the park fee in lieu of dedicating park land, pay **[**16]** the roadway impact fee, escrow $ 8,575 for the cost of building the Davis

Boulevard sidewalk, and build 400 feet of eight-inch offsite water main extending north of Rolling Wood and 255 feet of ten-inch and 738 feet of eight-inch sewer line extending north of Rolling Wood to connect to the Trinity River Authority sewer main. The City agreed to reimburse **Rischon** for sewer and water lines running to the adjacent Bandit Trail area.

Thus, when **Rischon** signed the Developer's Agreement, it had either proposed, adopted without objection, or agreed to without objection all eight of the requirements it now identifies as exactions.

Not until March 28, 2000--*after* **Rischon** consented to staff recommendations without objection and *after* it signed the Developer's Agreement--did **Rischon** finally raise, in a letter to the City, objections to the requirements for the Davis Boulevard sidewalk, the fire sprinklers in houses close to Davis Boulevard, the hike and bike **[*169]** paths, and the wrought iron fence except along Davis Boulevard. On September 1, 2000, **Rischon** filed a zoning amendment application requesting the refund of the Davis Boulevard sidewalk funds, elimination of the requirement to build fire sprinkler **[**17]** systems, reduction in the length of the hike and bike trails, changing the perimeter fence from wrought iron to wood, and elimination of the internal sidewalks. The Planning Commission and the City Council denied the application.

Rischon raised more objections in a second zoning amendment application in 2001, seeking to

eliminate the perimeter fence except along Davis Boulevard and reduce the length of the hike and bike trails. Again, the Commission and the Council denied the application.

The trial court made conclusions of law that **Rischon** either proposed all of the provisions of the Rolling Wood development or adopted them without objection. The trial court specifically concluded that **Rischon** consented to the payment of the roadway impact fees and the park fees. The trial court's unchallenged findings of fact support these conclusions.

Rischon argues that the only conclusion of law the trial court made with regard to consent concerns the roadway impact fees and the park fees. While the only conclusion containing the word "consent" is the one dealing with the roadway impact fees and the park fees, the trial court also concluded that **Rischon** proposed or adopted without objection *all* of [**18] the Rolling Wood requirements. In this case, in light of the trial court's unchallenged findings of fact, "proposed or adopted without objection" is indistinguishable from "consented."

We hold that by proposing, adopting without objection, or agreeing in the Developer's Agreement without objection to all of the Rolling Wood "requirements," **Rischon** consented to those requirements. Therefore, the trial court did not err by rendering a take-nothing judgment on **Rischon's** claims. We overrule **Rischon's** three issues and affirm the trial court's judgment.

ANNE GARDNER

JUSTICE

PANEL A: HOLMAN, GARDNER, and MCCOY, JJ.

DELIVERED: November 29, 2007

RISCHON DEVELOPMENT CORP.,
APPELLANT

v.

CITY OF KELLER,
APPELLEE

NO. 2-06-103-CV

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

From the 17th District Court of Tarrant County

ORDER

We have considered "Motion for Rehearing of Appellant Rischon Development Corporation."

It is the opinion of the court that the motion for rehearing should be and is hereby denied and that the opinion and judgment of November 29, 2007 stand unchanged.

The clerk of this court is directed to transmit a copy of the order to the attorneys of record.

SIGNED December 20, 2007

ANNE GARDNER
JUSTICE

PANEL A: Holman, Gardner and McCoy, JJ.

CAUSE NO. 17-193881-02
IN THE DISTRICT COURT OF
TARRANT COUNTY, TEXAS
17TH JUDICIAL DISTRICT

RISCHON DEVELOPMENT CORP.	§
	§
VS.	§
	§
CITY OF KELLER	§

PLAINTIFF'S BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW RISCHON DEVELOPMENT, Plaintiff in the above styled and numbered cause and files this its Brief as part of its opening statements and in order to assist the analysis of its arguments and provides such Brief as follows:

I.

First of all, Plaintiff would like to note that this Brief is somewhat in continuation of previous briefing on the law submitted by the Plaintiff as part of the discussions and arguments relating to the

previous Motions for Summary Judgment and such arguments are hereby incorporated by reference.

The case before us is essentially a takings case and any attempt by the Defendant to characterize it as some sort of zoning case is quite incorrect. The exactions and requirements and the delays occasioned by the Defendant's insistence upon such, were all related to developer fees and exactions such as those discussed in the Flower Mound case. Town of Flower Mound v. Stafford Estates 135 S.W.3d 620 (Tex. 2004). The Flower Mound case is truly the arena in which we must now litigate this and all similar cases. Flower Mound makes it quite clear that the matters in question are to be viewed without reference to sophistic arguments but rather in terms of the actuality of what is happening. If it looks like an exaction and sounds like an exaction, it is an

exaction. Whether a zoning flag is attached to it or any other attempt to characterize it as something else, the Court made it very clear that the courts are to be vigilant in their inspection of such things and to apply its standards to any such requirements. (In order to aid the Court's analysis, the Flower Mound and Glenn Heights cases are attached hereto with highlighting and annotations showing the areas of specific interest. The highlightings and annotations are, of course, those of Plaintiff's attorney.)

This is most certainly a Flower Mound case and, as such, is one by which the Texas Supreme Court has incorporated into Texas the rules with regards to analysis of the viability of municipal exactions largely based upon the Dolan case referenced in Flower Mound and also upon the Texas State Constitution. As the Court remembers, the

Texas State Constitution differs from the U.S. Constitution in that Article 1, Section 17 of the State Constitution - as referenced by both Flower Mound and Glenn Heights, is more extensive than the guarantees provided under the Federal. The Texas State Constitution provides for protection against takings or damagings and such is a quantum leap past the guarantee of the Fifth Amendment of the U.S. Constitution. The Supreme Court in its analysis in both Flower Mound and Glenn Heights has made it clear that they restricted themselves only to the protections under the Federal rules because no one had asked them to adjudicate, nor had they been briefed about, the issues relating to the Texas Constitution. Nonetheless, they referenced their own previous cases in which they had held that such protections were more extensive than those of the

Federal Constitution and also gave further hints that we should be even more vigilant in cases in which Article 1, Section 17 is at issue.

At a minimum, the Dolan rule applies. In order to justify or uphold any exactions or requirements by the cities of a developer the city must show that there is both a reasonable nexus of a legitimate public purpose for the requirements and then they must show that these requirements are themselves a roughly proportional and reasonable response to the amount of burden or harm being imposed upon the infrastructure of the City by the development and that the roughly proportional response is itself a proper reaction to this requirement and thereby a reasonable requirement of what is being asked for from the developer. In truth, they must show three (3) things beginning with the

nexus of a legitimate governmental use, some sort of an assessment of the burden, if any, being placed upon the city by the development and a showing that their response was proportional and appropriate to the two (2) preceding requirements. Plaintiff in this case strongly suggests that the City has done none of these things and can do none of these things based upon their previous testimony in this matter and that the circumstances in this case strongly require a finding that such requirements as imposed on RISCHON and the delays which were caused by the City's insistence upon such were inappropriate.

Additionally, because of the influence of the Texas Constitution, we would also note that the analysis of the Texas Supreme Court breaking the standards of review into three (3) distinct groups of which they chose the middle may be short of the

standard which we must apply in this case. In this case, because we are in fact litigating based upon the Texas Constitution it would seem only logical that the standard to be imposed is that of a strict correlation between the requirements rather than a rough proportionality since the lesser guarantees of the Federal Constitution were what triggered the protections of Dolan and were acted upon in the Flower Mound case. If that is the case, and we believe that to be the clear indications of the Supreme Court, then the standard which the Court must apply in this matter is one of a strict correlation in which the City must show that their responses were precisely and individually correct in terms of the legitimate public purpose and the harm, if any, or burden, if any, caused by the development.

Contrary to previous discussions by the

Defendant, we would also note the Flower Mound Court's obvious finding that the burden of showing such correlation is upon the City. Since they have such a requirement they must show all of the elements of each test in order for any one of the exactions to be upheld.

The City has also raised somewhat specious arguments with regards to waiver and attempted to characterize the fact that this is some sort of zoning case in which the Plaintiff necessarily was required to seek re-zoning and has therefore granted them absolution by some sort of waiver. First of all, to waive a constitutional right needs to be a fairly specific matter, as we previously briefed, and it is directly contrary to the arguments and sentiments expressed in the Flower Mound case where the courts make it clear that the circumstances of development

and the burdens upon development essentially put the developer "over a barrel" with regards to the City. If they do not comply with the requirements of the City then they are in a terribly difficult position economically and it is unrealistic for us to hold them to some sort of standard which does not permit them to recoup their damages if they have been victimized by improper procedures.

In this case especially, it is clear that these arguments do not apply since RISCHON complained vociferously about these requirements all during this process and especially after it became clear that the negotiations which they had been carrying on with the City were turning into a much more grasping situation in which the City began to overreach itself and ask for more and more in the Development Agreement and all of which led to the request by

RISCHON to modify these requirements, a request which the City summarily denied through the Council although the staff had, in fact, agreed with some of the proposals, again showing the disproportionality of the actions of the City.

One other factor which may be of interest to the Court is that Chapter 212 of the Local Government Code has been amended by the recent Legislature in adding Section 9.904 which codifies and enshrines the actions of the Flower Mound Court by enforcing, at a minimum, the rough proportionality rule for matters which may subsequently arise. Of course, the actions by the Legislature in emphasizing, as a matter of policy, that this is how the law in Texas is subsequently to be, does not also modify the basic guarantees of the State Constitution which may in fact go beyond the

specific findings of Flower Mound and the statute and require a stricter scrutiny even than that which was found in Flower Mound.

"The government cannot sidestep constitutional protections merely by rephrasing its decision from 'only if' to 'not unless'. The constitutional guarantee against uncompensated takings is 'more than a pleading requiement, and compliance with it is more than an exercise in cleverness and imagination'."

"....[W]e are unable to see any reason why limiting a government exaction from a developer to something roughly proportional to the impact of the development - in other words, prohibiting 'an out and out plan of extortion'- will bring down the government." See Flower Mound at p. 639.

WHEREFORE, PREMISES CONSIDERED,

Plaintiff requests this Court to consider the contents of the above Brief with regards to the arguments and evidence to be shown at trial and request such other and further relief as to which it may be shown to be justly entitled.

Respectfully submitted,

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No. 02-06-00103-CV

IN THE

SECOND DISTRICT COURT OF APPEALS

AT FORT WORTH, TEXAS

RISCHON DEVELOPMENT CORPORATION,

Appellant,

vs.

CITY OF KELLER, TEXAS

Appellee.

Appealed from the 17th Judicial District Court
Tarrant County, Texas

BRIEF OF APPELLANT RISCHON DEVELOPMENT CORPORATION

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ORAL ARGUMENT REQUESTED

ISSUES PRESENTED FOR REVIEW

ISSUE ONE

Rischon Established Keller's Liability Under Federal Law for the Uncompensated Exactions/Taking. (RR5 pp. 93-95; App. B)

ISSUE TWO

Under Federal Law, All Requirements Imposed by Keller Upon Rischon Were Exactions/Compensable Takings, In the Alternative, Keller's Requirements Were Exactions/Compensable Takings Because The "Requirements" are Individual Permitting Decisions. (CR244; App. A)

ISSUE THREE

Under Texas Constitutional Law, Keller is Liable for the Uncompensated Taking/Application to Public Use of Rischon's Property. (CR244; App. A)

> failure to do so resulted in its requirement that the developer (Stafford) pay for road improvements being a compensable taking.

Town of Flower Mound, 135 S.W.3d at 644-45 (App. C). Because Keller did not make an individualized determination, Rischon is the victim of a compensable taking.

E. Keller's Argument That Keller's "Zoning" Ordinance Legitimizes the Taking Was Rejected by the Texas Supreme Court.

During the trial, Keller argued that *Flower Mound* applies only to ad hoc decisions, and does not apply if a (zoning) ordinance or other legislative act provides authorization to the City. This argument was flatly rejected by the Texas Supreme Court in *Flower Mound*:

> The Town also argues that the Nollan/Dolan rule should not apply unless an exaction is imposed on an ad hoc, individualized basis . . . . **We are not convinced.** While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible

> that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.

Flower Mound, 135 S.W.3d at 640-41 (emphasis added) (App. C).

Similarly, the requirement that was the subject of the *Nollan* opinion had been applied to all forty-three similarly situated lots in the area once the California Coastal Commission received the authority to do so. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 829 (1987); *Flower Mound*, 135 S.W.3d at 631 (App. C). Thus, under *Nollan*, there is no "safe-harbor" for legislatively enacted and uniformly applied regulations, and there is also no "safe-harbor" for zoning ordinances that contain non-zoning requirements/exactions.

In summary, Keller's argument that solely *ad hoc* decisions may be challenged fails under the Texas

Supreme Court's *Flower Mound* opinion and *Nollan*.

See Flower Mound, 135 S.W.3d at 640-41 (App. C).

F. Keller's Waiver Argument Based Upon Rischon Entering into the Developer's Agreement Was Rejected By This Court.

The waiver defense was rejected by the Fort Worth Court of Appeals in its *Flower Mound* opinion. In its "Section V - Waiver of Suit," the Fort Worth Court of Appeals wrote:

> In its fifth issue on appeal, the **Town (of Flower Mound) . . . contends that**, because Stafford sought to receive the benefit of plat approval without first filing suit, Stafford has consented to the condition, has **waived** any challenge to it, and should be **estopped** from challenging it. . . . Absent such a statute or rule requiring Stafford to sue to challenge the Simmons Road improvements condition before obtaining plat approval, we decline to impose such a requirement on Stafford. . . . We overrule the Town's fifth issue.

Town of Flower Mound, 71 S.W.3d at 27, 28 (App. D) (emphasis added).

As a result, Keller can not argue that Rischon waived its complaint that Keller improperly imposed requirements upon Rischon because Rischon somehow consented to the exactions when Rischon entered into the Development Agreement. This is precisely the form of "consent" that developers such as Rischon need protection from.

G. Conclusion.

Keller's City Manager, Lyle Dresher, admitted that Keller imposed the "requirements" upon Rischon before Keller would give its approval to Rischon. Further, Dresher/Keller admitted that Keller did not make any individualized determinations as to Rischon's subdivision, and Keller provided the trial court with no evidence of any individualized determinations as to Rischon's subdivision. As a result, Keller failed the *Nollan/Dolan* test, and Keller is liable for its exactions/compensable taking.

Conclusion of Law No. 10 states that Keller did not perform a taking under article 1, section 17 of the Texas Constitution. (SCR12; App. A) This finding/conclusion is supported by no evidence, or, in the alternative, is against the great weight and preponderance of the evidence.

ISSUE TWO

(Restated)

Under Federal Law, All Requirements Imposed by Keller Upon Rischon Were Exactions/Compensable Takings, In the Alternative, Keller's Requirements Were Exactions/Compensable Takings Because The "Requirements" are Individual Permitting Decisions. (CR244; App. A)

ARGUMENT AND AUTHORITIES – ISSUE TWO

As discussed above, the Texas Supreme Court held that the *Nollan/Dolan* test applies to all exactions/requirements, whether ad hoc/individualized or uniformly applied to all similarly situated land owners. *Flower Mound*, 135

S.W.3d at 640-41 (App. C). Further, the *Flower Mound* holding is consistent with the *Nollan* holding, as the requirement/exaction that was the subject of the *Nollan* opinion had been applied to all forty-three similarly situated lots in the area once the California Coastal Commission received the authority to do so. *Nollan*, 483 U.S. at 829.

This Court did not reach the issue of whether the *Dolan* test applies to legislatively enacted, uniformly applied exactions in its *Flower Mound* opinion because the City of Flower Mound stipulated that it did not uniformly apply the relevant sections of the City of Flower Mound Development Code. *Town of Flower Mound*, 71 S.W.3d at 35 (App. D). In the event that this Court holds that the *Nollan / Dolan* test applies solely to exactions that are not legislatively enacted and uniformly applied (which Rischon believes would be a failure to follow

the Texas Supreme Court's holding described above), the evidence discussed below shows that Keller's requirements/exactions were not legislatively enacted and uniformly applied, and also provides more information regarding the specific nature of each requirement/exaction.

A. Keller Imposed Requirements/Exactions Upon Rischon When Keller Enacted an Ordinance Specific to This Property and Forced Rischon to Agree to Requirements/Exactions Placed in the Development Agreement.

On February 2, 1999, Keller enacted Ordinance No. 938, zoning Rischon's subdivision as a Planned Development ("PD") to contain lots no smaller than 12,000 square feet.[1] (JX27) Ordinance 938 also added various non-zoning requirements, such as fencing, a sidewalk escrow fee, hike/bike trail and residential fire sprinkler systems for all

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1 Again, Rischon does not complain about the minimum lot size requirement.

residences. (JX27) On March 21, 2000, Keller enacted Resolution 1375, approving a Development Agreement with Rischon. (JX20) The Development Agreement obligated Rischon to pay for sewer main extensions and improvements, street and drainage improvements and sidewalks. (JX20) The Development Agreement also obligated Rischon to pay Keller a sidewalk escrow fee for a future sidewalk on Davis Blvd., a park fee, a roadway impact fee. (JX20)

Rischon was forced to capitulate to Keller's demands. (RR3 219-20) If Rischon did not sign the Development Agreement, Keller would have stopped the project. (RR3 220)

B. Keller Refused Rischon's Requests to Remove Keller's Requirements/Exactions.

Keller denied Rischon's request for a zoning amendment to address many of the items below on November 16, 2000. (PX19, PX20) Rischon also

requested a modification of some additional items and that request was approved by the Keller Community Development Dept. (PX25), but the Planning and Zoning Commission denied Rischon's requested modification. (PX26) This was after Rischon was asked to put Rischon's request in the form of a PD amendment. (RR2 97, 114; PX15)

C. Because Keller's Exactions are not Legislatively Enacted, Uniformly Applied Exactions, the *Nollan/Dolan* Texas Applies to Keller's "Requirements."

Keller admitted that Keller required the "park zone dedication fees, dedication of land for private parks, street roadway impact fees, the hike and bike trail, the sidewalk fee for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-iron perimeter fence as well as the utility issues." (RR5 p. 94, App. B) A more specific description of each of the requirements/exactions, as well as a discussion of

why each requirement/exaction is not "legislatively *enacted and uniformly applied," follows.*

1. Utility Line Extensions.

Keller required Rischon to build utility extensions to both the north and the south of the subdivision that were not needed to serve this subdivision. (RR2 182-83) A portion of the work required by Keller benefited Colleyville, not Keller. (RR2 182-84) Both Mr. Dresher and Mr. Ilschner stated that if Rischon refused to make these improvements, Keller would not issue permits. (RR2 186) Keller required Rischon to provide additional utilities both on-site and offsite. (RR3 182-83) This required Rischon to incur additional expense. (RR3 183-84) Keller paid Rischon for a little of the additional work. (RR3 183-84)

A letter from Keller's attorney, Mr. Lowry, admits Keller required Rischon to "construct a

sanitary sewer from north of the development all the way through the development to a point [south] along Bandit Trail. (JX42, Jan. 4, 2000 Lowry Letter p. 1) Mr. Lowry's letter also states that "[a]t the request of the City of Keller . . . the developer will construct approximately 480 L.F. of offsite 8" sanitary sewer line from the southeast property line to Bandit Trail." (JX42, Jan. 4, 2000 Lowry Letter p. 2)

It is undisputed that existing homes were already present in the area south of the subdivision on Bandit Trail. (JX42, Jan. 4, 2000 Lowry Letter p. 1; JX43, Dec. 22, 1999 Rischon Letter)[2] The Bandit Trail residents have septic tanks and did not want this sewer utility extension. (RR2 101, 199) Keller's "Ordinance" required utility extensions to allow future connection by "new subdivisions," and took the wholly unsupportable position that there might be a

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2 A map of the properties is included as Exhibit A to

subdivision someday in the future in the existing residences along Bandit Trail. (JX42, Jan. 4, 2000 Lowry Letter p. 1) The Bandit Trail subdivision is approximately 40 years old (RR2 199) and can hardly be classified as a "new" subdivision.

Keller's policies and procedures for water and sanitary main extensions states "[a] development agreement shall be approved by the city council for each project on a **case by case basis.**" (JX19, Res. No. 995 Council Action sec.) (emphasis added) Also, Keller's ordinance provides that Keller has discretion to allow a reimbursement if the extension is within 100 feet of the 1000 foot length requirement. (RR2 193-94) This policy is not legislatively enacted and uniformly applied because it is applied "on a case by case basis" and because Keller has discretion if the 100 feet requirement is met.

JX37 and an overhead photograph is located at JX51.

Further, because the "policy" only applies to extensions in excess of 1000 feet for residential developments (JX19, Res. No. 995 Criteria sec.), this policy is not legislatively enacted and uniformly applied. Also, as interpreted by Mr. Lowry, the policy provided for reimbursement by Keller only for an individual line that exceeded 1000 feet. (RR2 193) As a result, Mr. Lowry's "interpretation" means that Keller can require multiple (actually, infinite) extensions, as long as no individual extension exceeds 1000 feet. (RR2 193) Here, Rischon was required to provide a 993 foot extension, as well as a 350 foot and two 400 foot lines. (RR2 195) The two 400 foot lines are a southeast line and a southwest line that also do not serve the Rischon subdivision. (RR2 198)

The approval of the preliminary plat included a requirement for off-site sewer and water easements for such main extensions to be included with the final

plat application. (JX24, Res. No. 1214 Section 1.1) This is consistent with the requirements previously imposed by the City Council on May 4, 1999. (JX25, Council Meeting Minutes pp. 7-8) Further, the Planning and Zoning Commission imposed the same requirements on April 12, 1999. (JX26, Planning and Zoning Commission Minutes pp. 2-3)

Finally, as part of the utility work required by Keller, Rischon was also required to pay for related items. This included having Rischon pay for repairs to an old city water line located outside the city's easement and extra concrete/work for the dam. (RR2 207-08)

B. Rischon Did Not Consent to the Taking.

Finally, Rischon did not consent. As discussed above, Dresher, and thus Keller, admitted that for Rischon to obtain Keller's approval and building permits for the subdivision, Keller required the "park

zone dedication fees, dedication of land for private parks, street roadway impact fees, the hike and bike trail, the sidewalk fee for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-iron perimeter fence as well as the utility issues." (RR5 p. 94, App. B) Similarly, John Hawkins, Rischon's President, testified Rischon was told by Keller that if Rischon did not build Keller's utilities for free and perform the other requirements, Rischon would not receive its permits. (RR2 129; RR4 9) Requiring a developer such as Rischon to provide improvements, pay fees and donate land to obtain Keller's approval/permits is not consent.

Accordingly, Rischon's rights under art. I, section 17 of the Texas Constitution were violated, and Keller is liable to Rischon. Conclusion of Law No. 10 states that Keller did not perform a taking under

article 1, section 17 of the Texas Constitution. (SCR12; App. A) This finding/conclusion is supported by no evidence, or, in the alternative, is against the great weight and preponderance of the evidence.

However, in the alternative, the Findings of Fact/Conclusions of Law do not contain a finding/conclusion regarding consent other than the roadway fees and park fees. (SCR4; App. A) As a result, these are the sole fees/requirements/exactions for which the trial court made a finding/conclusion that there was consent, so the remainder of the requirements/exactions were not consented to by Rischon.

PRAYER

For all the reasons stated in this brief, Appellant Rischon Development Corporation asks that this Court reverse the judgment of the trial court and render judgment in favor of Appellant

Rischon that City of Keller is liable to Rischon and remand this cause for proceedings regarding Rischon's damages, or, in the alternative, remand this cause for further proceedings in the 17th Judicial District Court of Tarrant County.

Respectfully submitted,

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No. 02-06-00103-CV

IN THE

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AT FORT WORTH, TEXAS

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vs.

CITY OF KELLER, TEXAS

Appellee.

Appealed from the 17th Judicial District Court
Tarrant County, Texas

REPLY BRIEF OF APPELLANT RISCHON DEVELOPMENT CORPORATION

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ORAL ARGUMENT REQUESTED

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REPLY ISSUE ONE (Restated) 3
Rischon Established Keller's Liability Under Federal Law for the Uncompensated Exactions/Taking. (RR5 pp. 93-95; App. B)

ARGUMENT AND AUTHORITIES FOR REPLY ISSUE ONE 3

A. Rischon Did Not Consent, And The Trial Court Did Not Find "Consent," For All of the Requirements Imposed On Rischon By Keller. 3

B. Keller's Waiver and Estoppel Defenses Were Previously Rejected By This Court Because The Texas Constitution Permits Solely Consent. 4

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No. 02-06-00103-CV

IN THE

SECOND DISTRICT COURT OF APPEALS

AT FORT WORTH, TEXAS

RISCHON DEVELOPMENT CORPORATION,

Appellant,

vs.

CITY OF KELLER, TEXAS

Appellee.

REPLY BRIEF OF APPELLANT RISCHON DEVELOPMENT CORPORATION

TO THE COURT OF APPEALS:

Appellant Rischon Development Corporation ("Rischon" or "Appellant") submits this Appellant's Reply Brief. Appellee City of Keller, Texas will be referred to as "Keller" or "Appellee."

REPLY ISSUES PRESENTED FOR REVIEW

REPLY ISSUE ONE

Rischon Established Keller's Liability Under Federal Law for the Uncompensated Exactions/Taking. (RR5 pp. 93-95; App. B)[1]

REPLY ISSUE TWO

Keller Did Not Meet Its Burden of Providing Evidence Meeting the Rough Proportionality Test. (CR244; App. A)

REPLY ISSUE THREE

Under Texas Constitutional Law, Keller is Liable for the Uncompensated Taking/Application to Public Use of Rischon's Property. (CR244; App. A)

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[1]References to the appellate record will be made as follows:

CR- Clerk's Record SCR – Supp. Clerk's Record
RR- Reporter's Record
App.- Appendix to Appellant's Brief
JX – Joint Trial Exhibit (RR8 & RR9)
PX – Plaintiff (Rischon) Trial Exhibit (RR10)
DX – Defendant (Keller) Trial Exhibit (RR11)

BRIEF OF ARGUMENT

REPLY ISSUE ONE

(Restated)

Rischon Established Keller's Liability Under Federal Law for the Uncompensated Exactions/Taking. (RR5 pp. 93-95; App. B)

ARGUMENT AND AUTHORITIES FOR REPLY ISSUE ONE

A. Rischon Did Not Consent, And The Trial Court Did Not Find "Consent," For All of the Requirements Imposed On Rischon By Keller.

Throughout Keller's Brief, Keller states that Rishon "consented" to Keller's requirements. Keller even cites this Court to *Hale v. Lavaca County Flood Control Dist.*, 344 S.W.2d 245 (Tex. Civ. App.—Houston 1961, no writ) as an "analogous case of consent and acquiescence." (Keller's Brief p. 22) The language quoted from the *Hale* opinion by Keller on page 23 of Keller's Brief shows that Keller's consent

argument fails: "In the instant case the record shows that appellants . . . made no object whatever to the action of the Special Commissioners, although given every opportunity to do so." *Hale*, at 248.

Contrary to the facts present in *Hale*, it is undisputed that Rischon objected to Keller's Requirements. Rischon asked Keller to bear the costs to extend the sewer line. (PX8) Rischon asked for changes to Keller's "zoning" ordinance so Keller would reimburse Rischon under Keller's reimbursement policy, the return of the $8,575 sidewalk fee, not be required to build the gate, not be required to install sprinklers for houses within 600 feet of Davis Blvd., change the hike/bike trails, change the landscaping requirement, change the fencing requirement. (JX37) Rischon filed a zoning amendment application, which Keller denied.(PX19, PX20) Rischon filed a second zoning amendment,

which Keller also denied. (PX26) Put simply, Keller's allegation on page 25 of its Brief that, contrary to the Plaintiff in *Stafford*, "Rischon embraced the alleged exactions without objection" is wholly false.

In the alternative, however, the sole "consent" found by the trial court was the result of Rishcon entering into the Developer's Agreement, and is limited to the roadway impact fees and park fees. (FOF/COL #8, CR11; App. A). Thus, to the extent this Court is prepared to affirm based upon Keller's "consent" defense, it should be limited to the trial court's findings on these two fees only.

B. Keller's Waiver and Estoppel Defenses Were Previously Rejected By This Court Because The Texas Constitution Permits Solely Consent.

Additionally, as noted in Rischon's Appellant's Brief (p. 12), Keller's waiver/estoppel defense was rejected by the Fort Worth Court of Appeals in its

Flower Mound opinion. *Town of Flower Mound v. Stafford Estates, L.P.*, 71 S.W.3d 18, 27, 28 (Tex. App.--Fort Worth 2002), *aff'd, Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620 (Tex. 2004). The Texas Constitution permits solely consent, not waiver or estoppel. TEX. CONST. art. I, § 17 ("No person's property shall be taken . . . unless by the consent of such person.") Accordingly, Keller's waiver and estoppel arguements fail based upon the express language of the Texas Constitution.

C. Rischon Has Standing.

Keller also argues on pages 28 and 29 of its Brief that Rischon somehow lacks standing to complain about Keller's "zoning" ordinance (PD-938) because Rischon did not own the property when PD-938 was enacted. This argument fails for multiple reasons.

First, the existence of Rischon's contract for the sale of the real estate conferred standing to sue. To establish standing for an article I, section 17 claim, the government action must result in a "taking" or "damaging" of vested property rights. *See State/Operating Contractors ABS Emissions, Inc. v. Operating Contractors/State*, 985 S.W.2d 646, 651-52 (Tex. App.--Austin 1999, pet. denied). The word "property" as used in the takings clause refers to "every species of property." *Renault, Inc. v. City of Houston*, 415 S.W.2d 948, 952 (Tex. Civ. App.-Waco 1967), *rev'd on other grounds*, 431 S.W.2d 322 (Tex. 1968). A contract for sale refers to the transfer of the seller's equitable title in consideration of the buyer's promise to pay the purchase price (*Frady v. May*, 23 S.W.3d 558, 565 (Tex. App.--Fort Worth 2000, pet. denied)), and passes equitable title to the buyer. *Lefevere v. Sears*, 629 S.W.2d 768, 770 (Tex. Civ.

App.--El Paso 1981, no writ). Accordingly, because Rischon had equitable title, Rischon possessed "property" and standing to sue.

Second, it is undisputed that Rischon purchased the property and that after Rischon's purchase, Keller required Rischon to perform the acts without adequate compensation that are the exactions at issue. Rischon does not complain solely regarding the "zoning" ordinance PD-938. Thus, contrary to Keller's argument, Rischon owned the property when the "taking" occurred.

REPLY ISSUE TWO

(Restated)

Keller Did Not Meet Its Burden of Providing Evidence Meeting the Rough Proportionality Test. (CR244; App. A)

ARGUMENT AND AUTHORITIES – REPLY ISSUE TWO

Texas cities are required to make an individualized determination as a basis for satisfying the "rough proportionality" requirement. "However, **the City has the burden of showing that it made "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."** *Flower Mound*, at 643 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)) (emphasis added). Thus, Flower Mound was required to "measure that impact in a meaningful, though not precisely mathematical way," and Flower Mound's

failure to do so resulted in its requirement that the developer (Stafford) pay for road improvements being a compensable taking. *Town of Flower Mound*, 135 S.W.3d at 644-45.

Keller's Brief, at pgs. 31-35, points to evidence regarding certain attributes of Rischon's property, but does not show that Keller "made an individualized determination" or that Keller ever sought to "measure the impact" of Rischon's development. Because Keller failed to submit evidence to satisfy Keller's burden of proof, Keller's requirements that Rischon pay for the "requirements" is a compensable taking. *See Town of Flower Mound*, 135 S.W.3d at 644-45.

REPLY ISSUE THREE

(Restated)

Under Texas Constitutional Law, Keller is Liable for the Uncompensated Taking/Application to Public Use of Rischon's Property. (CR244; App. A)

ARGUMENT AND AUTHORITIES – REPLY ISSUE THREE

A. The City Manager's Testimony Is Binding Because Dresher's Testimony Meets The Requirements Of *Mendoza*.

On page 36-37, Keller argues that the testimonial admissions of the City Manager that Keller forced the "requirements" upon Rischon and that Keller did not make the required "individualized determination" are somehow not conclusive. The Texas Supreme Court has written regarding when a party's testimonial/quasi- admissions are conclusive:

> However, as a matter of public policy, a party's testimonial quasi-admission will preclude recovery if it meets the requirements set out in *Griffin v. Superior Insurance Co.*, 161 Tex. 195, 338

S.W.2d 415, 419 (Tex.1960) and *United States Fidelity & Guaranty Co. v. Carr*, 242 S.W.2d 224, 229 (Tex. Civ. App.--San Antonio 1951, writ refused). The public policy underlying this rule is that it would be unjust to permit a party to recover after he has sworn himself out of court by clear, unequivocal testimony. *Carr*, supra. A quasi-admission will be treated as a judicial admission if it appears:

(1) That the declaration relied upon was made during the course of a judicial proceeding.

(2) That the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony.

(3) That the statement is deliberate, clear, and unequivocal. The hypothesis of mere mistake or slip of the tongue must be eliminated.

(4) That the giving of conclusive effect to the declaration will be consistent with the public policy upon which the rule is based.

(5) That the statement is not also destructive of the opposing party's theory of recovery. Id. at 229. (Emphasis added).

Mendoza v. Fidelity & Guaranty Ins. Underwriters, Inc., 606 S.W.2d 692, 694 (Tex. 1980).

The City Manager's testimony meets the *Mendoza* test. The testimony was during trial, and is contrary to Keller's stated defense that Keller did not require Rischon to perform the acts. (RR5 pp. 93-94) This was not a slip of the tongue, as following an objection to using the defined term "exactions," Dresher himself suggested using the term "requirements." (RR5 pp. 93-94) This admission is consistent with public policy that it would be unfair to permit Keller to defend following Dresher's "clear, unequivocal testimony." Finally, Dresher's, and thus Keller's, admission is not destructive to Rischon's theory of recovery.

B. Because there is no Finding/Conclusion Regarding "Rough Proportionality," The Exaction Was Established.

Following a bench trial, when the trial court files findings of fact and conclusions of law, additional implied findings and or conclusions in support of the judgment will be made solely if an at least one element was included as a finding/conclusion. TEX. R. CIV. P. 299 ("The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment.")

There is no Finding/Conclusion, and no element, found/entered by the trial court regarding

Keller's burden to show "rough proportionality." (CR285, SCR4-12) (App. A to Appellant's Brief) Accordingly, Keller is not entitled to a presumed finding/conclusion of the missing elements under rule 299. Further, Keller may not argue the judgment may be affirmed based upon evidence of "rough proportionality," as the evidence does not establish "rough proportionality" as a matter of law.

PRAYER

For all the reasons stated in this brief, Appellant Rischon Development Corporation asks that this Court reverse the judgment of the trial court and render judgment in favor of Appellant Rischon that City of Keller is liable to Rischon and remand this cause for proceedings regarding Rischon's damages, or, in the alternative, remand this cause for further proceedings in the 17th Judicial District Court of Tarrant County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing instrument was served by certified mail, return receipt requested, on _____ day of June, 2007, upon:

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_____
Jeffrey R. Sandberg

No. 02-06-00103-CV

IN THE

SECOND DISTRICT COURT OF APPEALS

AT FORT WORTH, TEXAS

RISCHON DEVELOPMENT CORPORATION,

Appellant,

vs.

CITY OF KELLER, TEXAS

Appellee.

MOTION FOR REHEARING OF APPELLANT RISCHON DEVELOPMENT CORPORATION

Appellant, Rischon Development Corporation ("Rischon" or "Appellant"), submits this motion requesting the Court to withdraw its Opinion and vacate its Judgment, and respectfully shows the Court as follows:

I.

POINTS PRESENTED FOR REVIEW

A. While it is True That Rischon Did Not Cite to the Federal Constitution, Rischon Cited This Court, on Multiple Occasions, to Appellate Opinions That Discuss and Interpret the Federal Constitution.

B. Rischon's First Amended Petition Alleges a Taking Under the Federal Constitution Because It Cites to *Flower Mound*.

C. Rischon's "Brief" to the Trial Court Discusses Both Federal and Texas Takings Law.

D. Because the Trial Court Found "Consent" Solely as to Two of the Requirements, it is Improper for This Court to Substitute Its Own Factual Findings When Keller Did Not Cross-Appeal.

II.

ARGUMENT AND AUTHORITIES

A. While it is True That Rischon Did Not Cite to the Federal Constitution, Rischon Cited This Court, on Multiple Occasions, to Appellate Opinions That Discuss and Interpret the Federal Constitution.

This Court states that "nowhere in its brief does [Rischon] cite or even mention the federal constitution." See App. A, Opinion p. 11 n. 2. This is true, but does not accurately describe Rischon's briefing.

Rischon adequately argued and cited this Court to applicable federal and Texas appellate opinions in both Rischon's Appellant's Brief and Appellant's Reply Brief. Rischon's Appellant's Brief cites this Court to *Dolan v. City of Tigard*, 512 U.S. 374 (1994), on pages 10 & 11. Rischon's Appellant's Brief cites this Court to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), on pages 10 & 11.

Rischon's Appellant's Brief cites this Court to this Court's opinion, *Town of Flower Mound v. Stafford Estates, L.P.*, 71 S.W.3d 18, 35 (Tex. App.--Fort Worth 2002), *aff'd, Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620 (Tex. 2004), on pages 6, 9, 10, 13, 14, 22 & 23. Rischon's Appellant's Brief cites this Court to the Texas Supreme Court's opinion, *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620 (Tex. 2004), on pages 4, 6, 9, 10, 11, 12, 14, 23. *Dolan* and both *Flower Mound* opinions are cited in Rischon's Reply Brief.

These appellate opinions, as this Court is well aware, discuss and apply the federal constitution standard. As a result, there was no requirement that Rischon provide an additional cite or additional discussion of the federal constitution.

B. Rischon's First Amended Petition Alleges a Taking Under the Federal Constitution Because It Cites to *Flower Mound.*

This Court states "nor did [Rischon] allege a taking under the federal constitution in its trial court pleadings." See App. A, Opinion p. 11 n. 2. Rischon's First Amended Petition cites *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620 (Tex. 2004), which discusses and applies a federal constitution standard. (CR42)

C. Rischon's "Brief" to the Trial Court Discusses Both Federal and Texas Takings Law.

This Court states "in a trial court brief, Rischon specifically stated, '[w]w are in fact litigating based upon the Texas Constitution . . ..'" See App. A, Opinion p. 11 n. 2. Let's look at some other statements in Rischon's trial court brief, which is attached at Appendix B for the Court's convenience. On page 1, the brief cites *Town of Flower Mound v.*

Stafford Estates L.P., 135 S.W.3d 620 (Tex. 2004), which discusses and applies a federal constitution standard. (App. B, CR200)

On page 2, the brief states "[t]his is most certainly a Flower Mound case, and, as such, is one by which the Texas Supreme Court has incorporated into Texas the rules with regards to analysis of the viability of municipal exactions based upon the Dolan case . . .." (App. B, CR201) After a short discussion of the relationship between the Texas and federal standard as discussed in Flower Mound, the brief states at the bottom of page 2 "[a]t a minimum, the Dolan rule applies." (App. B, CR201) A courtesy copy of the iFlower Mound opinion is attached to the brief. (App. B, CR206-CR219)

D. Because the Trial Court Found "Consent" Solely as to Two of the Requirements, it is Improper for This Court to Substitute Its Own Factual Findings When Keller Did Not Cross-Appeal.

The Opinion equates "consent" with "proposed or adopted without objection." See App. A, Opinion pp. 16-17. This is the basis for this Court's extension of the finding of consent as to two of the requirements to all of the requirements. It is error for this Court to rewrite the trial court's Conclusion of Law to support this Court's belief.

A reviewing court "is not authorized to substitute its judgment for that of the trial court." *Brittain v. McBeath*, 667 S.W.2d 280, 281-282 (Tex. App.—1984, writ ref'd, n.r.e.) (citing *Chitsey v. Pat Winston Int. Design, Inc.*, 558 S.W.2d 579 (Tex. Civ. App.--Austin 1977, no writ). The trial court found consent as to only two of the requirements. Keller did not appeal. This Court should not substitute its

belief that there was consent as to all of the requirements for the trial court's finding, which is unchallenged by Keller.

PRAYER

For the above reasons, Appellant asks the Court to grant this motion and withdraw its Opinion and Judgment, that this Court reverse the judgment of the trial court and render judgment in favor of Appellant Rischon Development Corporation, or, in the alternative, remand this cause for further proceedings in the 17th Judicial District Court, and such further relief, at law or equity, for which Appellant is entitled.

Respectfully submitted,
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CERTIFICATE OF CONFERENCE

Counsel certifies that on December 12, 2007, counsel conferred with S.G. Johndroe, III, Esq., counsel for Appellee City of Keller, who stated that his client opposes this motion.

JEFFREY R. SANDBERG

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been forwarded to the following counsel of record in accordance with the Texas Rules of Appellate Procedure on this the 13th day of December, 2007.

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JEFFREY R. SANDBERG

No. _____

IN THE

SUPREME COURT

OF TEXAS

RISCHON DEVELOPMENT CORPORATION,

Petitioner,

vs.

CITY OF KELLER, TEXAS

Respondent.

PETITION FOR REVIEW OF RISCHON DEVELOPMENT CORPORATION

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ISSUES PRESENTED FOR REVIEW

ISSUE ONE

Rischon Did Not Consent, and the Fort Worth Court's Creation of an Unfettered "Safe-Harbor" Allowing Local Governments to Avoid *Flower Mound* is Error.

ISSUE TWO

The Court of Appeals Erred When it Modified/Reversed a Conclusion of Law to Provide Keller Additional Relief Because There is Some Evidence to Support the Trial Court's Refusal to Apply Keller's Consent Defense to Six of the Requirements/Exactions. (RR5 pp. 93-94, App. C)

ISSUE THREE

The Court of Appeals Erred When it Refused to Consider Rischon's Federal Constitution Takings/Exactions Claims Because Rischon Cited the Trial Court and the Fort Worth Court, on Multiple Occasions, to Appellate Opinions That Discuss and Interpret the Federal Constitution.

STATEMENT OF FACTS/SUMMARY OF ARGUMENT

A. Keller's City Manager Admitted That Keller Imposed "Requirements" Upon Rischon as a Condition to Keller's Approval.

Rischon developed a 23-lot residential subdivision in Keller. (RR2 37, 39) During the first three days of trial, there was detailed testimony regarding the various requirements that Keller imposed upon Rischon as conditions for Keller's approval. On the fourth day of trial, Rischon called Mr. Lyle Dresher, who had been present for the previous testimony and was Keller's City Manager for ten years, to testify and make admissions on behalf of Keller. (RR5 pp. 93-94, App. C) Dresher, and thus Keller, admitted that to obtain Keller's approval and building permits for the subdivision, Rischon was required to pay/provide the "park zone dedication fees,

dedication of land for private parks, street roadway impact fees, the hike and bike trail, the sidewalk fee for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-iron perimeter fence as well as the utility issues." (RR5 p. 94, App. C) Similarly, John Hawkins, Rischon's President, testified Rischon was told by Keller that if Rischon did not build Keller's utilities for free and perform the other requirements, Rischon would not receive its permits. (RR2 129; RR4 9)

Keller's documents also establish the admissions made by Keller at trial. On February 2, 1999, Keller enacted Ordinance No. 938, zoning Rischon's subdivision as a Planned Development ("PD") to contain lots no smaller than 12,000 square feet. (JX27) Ordinance 938 also added various non-zoning requirements, such as fencing,

a sidewalk escrow fee, hike/bike trail and residential fire sprinkler systems for all residences. (JX27) On March 21, 2000, Keller enacted Resolution 1375, approving a Development Agreement with Rischon. (JX20) The Development Agreement obligated Rischon to pay for sewer main extensions and improvements, street and drainage improvements and sidewalks. (JX20) The Development Agreement also obligated Rischon to Pay Keller a sidewalk escrow fee for a future sidewalk on Davis Blvd., a park fee and a roadway impact fee. (JX20)

B. Because Keller Did Not Make an Individualized Determination, Keller Failed the "Rough Proportionality" Test, Making Keller's Actions a "Compensable Taking."

Further, Dresher, and thus Keller, admitted that Keller did not make any individualized determinations as to Rischon's subdivision, Rolling

Wood. (RR5 p. 96, App. C) Texas cities are required to make an individualized determination as a basis for satisfying the "rough proportionality" requirement adopted by the United States Supreme Court in its *Nollan* and *Dolan* opinions, as well as this Court's and the Texas Supreme Court's *Flower Mound* opinions. As a result, Keller's actions are a "compensable taking."

C. Rischon Did Not Consent to Keller's Requirements/Exactions.

Dresher, and thus Keller, admitted that for Rischon to obtain Keller's approval and building permits for the subdivision, Keller required the "park zone dedication fees, dedication of land for private parks, street roadway impact fees, the hike and bike trail, the sidewalk fee for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-

iron perimeter fence as well as the utility issues." (RR5 p. 94, App. B) Similarly, John Hawkins, Rischon's President, testified Rischon was told by Keller that if Rischon did not build Keller's utilities for free and perform the other requirements, Rischon would not receive its permits. (RR2 129; RR4 9) Requiring a developer such as Rischon to provide improvements, pay fees and donate land to obtain Keller's approval/permits is not consent.

Additionally, even if Rischon somehow did consent to the two requirements/exactions found by the trial court, and not all of the requirements as modified by the Court of Appeals, guidelines are needed for all developers and local governments across all of Texas. Frankly, taking into account the economic pressures upon a developer that needs government approvals to construct a project,

under what circumstances may there be an effective consent? Rischon argues that the best-reasoned approach would allow a consent only if the requirement/exaction also meets the constitutional requirements.

D. Rischon Adequately Pleaded and Briefed the U.S. Constitution Standard to Both the Trial Court and Appellate Court Because Rischon Cited to Appellate Opinions That Discuss This Standard.

The Court of Appeals refused to consider Rischon's appellate issues concerning the U.S. Constitution standard because Rischon did not expressly cite to the U.S. Constitution. Because Rischon cited, on multiple occasions, to appellate opinions that apply the U.S. Constitution takings/exactions standard, including *Nollan*, *Dolan*, this Court's *Flower Mound* opinion, and the

Fort Worth Court's *Flower Mound* opinion, the Fort Worth Court erred.

ARGUMENT

ISSUE ONE

(Restated)

Rischon Did Not Consent, and the Fort Worth Court's Creation of an Unfettered "Safe-Harbor" Allowing Local Governments to Avoid *Flower Mound* is Error.

ARGUMENT AND AUTHORITIES FOR ISSUE ONE

According to the Fort Worth Court, when a local government, such as the City of Keller, wishes to require a developer such as Rischon to donate land, pay fees and make uncompensated improvements to obtain local government approval, all the local government needs to do is require the developer to include the items in an ordinance request or Developer Agreement. (Opinion at 16; App. A) The Court of Appeals held

the developer's complaints to all levels of the bureaucracy, including requests to modify the ordinance and Developer's Agreement, may be refused, as the developer has somehow "consented."

A. The Fort Worth Court Ignores Rischon's Requests, Both Before And After The Approval of the Plat And Developer's Agreement, To Modify the Requirements/Exactions.

The Fort Worth Court distinguishes *Flower Mound* and *Sefzik* because "Rischon raised no objections to the requirements of which it now complains until after the City approved the plat and after Rischon and the City entered into the Developer's Agreement." (Opinion p. 13; App. A) Obviously, this statement ignores the admissions of Keller made by its City Manager, Lyle Dresher, that Rischon was required to pay/provide the

requirements/exactions to obtain Keller's approval. (RR5 p. 94, App. C)

Further, both Mr. Dresher and Mr. Ilschner (Keller's engineer) stated that if Rischon refused to make the utility improvements, Keller would not issue permits. (RR2 186) A Jan. 4, 2000 letter from Keller's attorney, Mr. Lowry, ***responding to Rischon's complaints***, admits Keller required Rischon to "construct a sanitary sewer from north of the development all the way through the development to a point [south] along Bandit Trail. (JX42[1], Jan. 4, 2000 Lowry Letter p. 1) Mr. Lowry's letter also states that "[a]t the request of the City of Keller . . . the developer will construct approximately 480 L.F. of offsite 8" sanitary sewer

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1 It should be noted this is a "Joint Exhibit," not solely Plaintiff's Exhibit, so it is an admission by Keller that Rischon was disputing Keller's actions. It also predates the March 2000 Developer's Agreement.

line from the southeast property line to Bandit Trail." (JX42, Jan. 4, 2000 Lowry Letter p. 2)

Similarly, the Planning and Zoning Commission added the hike/bike trail and sidewalk escrow fee requirements after first denying the proposed zoning change request that did not include these requirements. (JX29, Planning and Zoning Commission Minutes pp. 4-6) Also, the sidewalks were not in Rischon's original plans approved by the City Council, but Keller subsequently added this requirement. (RR2 155-56) Keller admitted the residential fire sprinklers requirement was a "request" by the Keller Fire Chief. (PX2, N. Zolghradi Jan. 7, 1999 Memo to P&Z Commission p. 2) The perimeter fence requirement was added by Keller at a Keller public hearing. (RR2 177)

Just as the City of Flower Mound "was well aware of Stafford's position" (*Flower Mound*, 135 S.W.3d at 630), Keller was aware of Rischon's position.

B. The Rischon/Keller Developer's Agreement is not a Voluntary Agreement.

The evidence discussed in Section A above also shows that Rischon did not voluntarily enter into the Developer's Agreement. Rischon objected to the requirements/exactions, and Keller was well aware of Rischon's objections.

C. Consent Should Not Be Permitted When the Exactions are Unconstitutional.

In this Court's discussion of the application of *Dolan* to non-dedicatory takings by the courts of last resort in other states, this Court noted that the Washington Supreme Court held the "county's park development fees were lawful under statute if

the fees were imposed pursuant to a **voluntary agreement**, and were reasonably necessary as a direct result of the proposed development or required to mitigate the direct impact of the development." *Flower Mound*, 135 S.W. at 639 n. 109 (citing *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187, 189-190 (Wash. 1994)).

It makes sense to Rischon that if consent is to be permitted under limited circumstances, the requirement/exaction must first meet the two-part *Nollan/Dolan* test discussed in *Flower Mound*. Otherwise, the "safe-harbor" created by the Fort Worth Court will have no limits.

ISSUE TWO

(Restated)

The Court of Appeals Erred When it Modified/Reversed a Conclusion of Law to Provide Keller Additional Relief Because There is Some Evidence to Support the Trial Court's Refusal to Apply Keller's Consent Defense to Six of the Requirements/Exactions. (RR5 pp. 93-94, App. C)

ARGUMENT AND AUTHORITIES FOR ISSUE TWO

A. Appellate Review of Trial Court's Conclusions of Law – Legal Sufficiency.

"Appellate courts review a trial court's conclusions of law as a legal question." *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002) (cit. omitted). A trial court's conclusions of law are reviewed de novo, and are upheld unless they are erroneous as a matter of law. *See State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1999).

Stated another way, challenges to a trial court's conclusions of law may not be made for factual insufficiency. *BMC Software Belg., N.V.*, 83 S.W.3d at 794.

B. There is Evidence, Including the Admissions of the Keller City Manager That Rischon Was Required to Agree to the Exactions to Obtain Keller's Approval, to Support the Trial Court's Refusal to Find "Consent" to All of the Requirements/Exactions.

On the fourth day of trial, Rischon called Mr. Lyle Dresher, who had been present for the previous testimony and was Keller's City Manager for ten years, to testify and make admissions on behalf of Keller. (RR5 pp. 93-94, App. C) Dresher, and thus Keller, admitted that to obtain Keller's approval and building permits for the subdivision, Rischon was required to pay/provide the "park zone dedication fees, dedication of land for private parks, street roadway impact fees, the hike and

bike trail, the sidewalk fee for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-iron perimeter fence as well as the utility issues." (RR5 p. 94, App. C) Similarly, John Hawkins, Rischon's President, testified Rischon was told by Keller that if Rischon did not build Keller's utilities for free and perform the other requirements, Rischon would not receive its permits. (RR2 129; RR4 9)

The trial court refused to apply Keller's consent defense to six of the requirements/exactions. (FOF/COL and Supp. FOF/COL; App. B.) The Court of Appeals is permitted to modify this Conclusion of Law only if Keller's consent defense was established as a matter of law. Because there is some evidence that Rischon was required to perform the requirements to obtain Keller's approval, and thus

some evidence that Rischon did not consent, the Court of Appeals erred when it modified/reversed the Conclusion of Law and expanded the consent defense to include all requirements/exactions.

ISSUE THREE

(Restated)

The Court of Appeals Erred When it Refused to Consider Rischon's Federal Constitution Takings/Exactions Claims Because Rischon Cited the Trial Court and the Fort Worth Court, on Multiple Occasions, to Appellate Opinions That Discuss and Interpret the Federal Constitution.

ARGUMENT AND AUTHORITIES FOR ISSUE THREE

A. While it is True That Rischon' Appellate Brief Did Not Cite to the Federal Constitution, Rischon Cited, on Multiple Occasions, to Appellate Opinions That Discuss and Interpret the Federal Constitution.

The Fort Worth Court states that "nowhere in its brief does [Rischon] cite or even mention the federal constitution." (Opinion p. 11 n. 2; App. A)

It is true that Rischon did not cite to the federal constitution, but the Opinion does not accurately describe Rischon's briefing.

Rischon adequately argued and cited the Fort Worth Court to applicable federal and Texas appellate opinions in both Rischon's Appellant's Brief. Rischon's Appellant's Brief cites to *Dolan v. City of Tigard*, 512 U.S. 374 (1994), on pages 10 & 11. Rischon's Appellant's Brief cites to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), on pages 10 & 11. Rischon's Appellant's Brief cites to this Court's opinion, *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620 (Tex. 2004), on pages 4, 6, 9, 10, 11, 12, 14 & 23.[2] Rischon's

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2 For example, at pg. 10 of Appellant's Brief: "The ***federal standard*** found in *Nollan* and *Dolan* is generally as follows: 'conditioning government approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate government interest and (2)

Appellant's Brief cites to the Fort Worth Court's opinion, *Town of Flower Mound v. Stafford Estates, L.P.*, 71 S.W.3d 18, 35 (Tex. App.--Fort Worth 2002), *aff'd*, *Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620 (Tex. 2004), on pages 6, 9, 10, 13, 14, 22 & 23. These appellate opinions, as this Court is well aware, discuss and apply the federal constitution standard. Briefing rules are to be applied liberally; there is no additional requirement that Rischon provide an additional cite to the federal constitution. *See* TEX. R. APP. P. 38.9.

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is roughly proportional to the projected impact of the proposed development.' *Town of Flower Mound*, 135 S.W.3d at 634 (App. C)." (emphasis added)

A. Rischon's First Amended Petition Alleges a Taking Under the Federal Constitution Because It Cites to *Flower Mound*.

The Fort Worth Court states "nor did [Rischon] allege a taking under the federal constitution in its trial court pleadings." (Opinion p. 11 n. 2; App. A). This is wrong, as Rischon's First Amended Petition cites to *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620 (Tex. 2004), which discusses and applies a federal constitution standard. (CR42)

B. Rischon's "Brief" to the Trial Court Discusses Both Federal and Texas Takings Law.

The Fort Worth Court states "in a trial court brief, Rischon specifically stated, '[w]e are in fact litigating based upon the Texas Constitution . . .'" (Opinion p. 11 n. 2; App. A) Yes, it does, but this is not the whole story. Let's look at some other

statements in Rischon's trial court brief, which is attached at Appendix E for the Court's convenience. On page 1, the brief cites *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620 (Tex. 2004), which discusses and applies a federal constitution standard. (App. E, Plaintiff's Brief, CR200)

On page 2, the brief states "[t]his is most certainly a Flower Mound case, and, as such, is one by which the Texas Supreme Court has incorporated into Texas the rules with regards to analysis of the viability of municipal exactions based upon the Dolan case . . .." (App. E, Plaintiff's Brief, CR201) After a short discussion of the relationship between the Texas and federal standard as discussed in Flower Mound, the brief states at the bottom of page 2 "[a]t a minimum, the

Dolan rule applies." (App. E, Plaintiff's Brief, CR201) A courtesy copy of the *Flower Mound* opinion is attached to the brief. (App. E, Plaintiff's Brief, CR206-CR219)

In summary, the federal constitution standard was argued to the trial court, and was also adequately briefed to the Fort Worth Court.

PRAYER

For all the reasons stated in this brief, Petitioner Rischon Development Corporation asks that this Court reverse the judgment of the trial court and render judgment in favor of Petitioner Rischon Development Corporation, or, in the alternative, remand this cause for further proceedings.

MR. KALLAS: Your Honor, if the witness is released, may she remain in the courtroom?

THE COURT: She's free to stay or go, whichever she wants to do.

MR. SANDBERG: Your Honor, we'll call the City Manager, Mr. Dresher, at this time.

(Pause)

LYLE DRESHER,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q (By Mr. Sandberg) (By Mr. Sandberg) Mr. Dresher, could you please tell us your name and your occupation.

A My name is Lyle Dresher, I'm the City Manager for the City of Keller.

Q And how long have you continuously been the City Manager for the City of Keller?

A Ten years.

Q And before that time?

A What was my previous experience?

Q What was your position prior to ten years before you became city manager?

A I was a city manager.

Q Where?

A I was City Manager for the City of Gainesville, Texas.

Q Was that up until ten years ago?

A Approximately, uh-huh.

Q Mr. Dresher, you have been sitting here at the City of Keller's counsel table for about three and a half days now; is that correct?

A Yes, sir.

Q Okay. Have you been paying attention to the testimony?

A Yes.

Q Okay. You have been hearing about a number of issues. Let me list them for you. You have been hearing about park zone dedication fees, dedication of land for private parks, street roadway impact fees, the hike and bike trial, the sidewalk fee for Davis Boulevard, the internal sidewalks within the development, the sprinkler issues, the wrought-iron perimeter fence as well as the utility issues; is that correct?

A Yes, sir.

Q Okay. Rischon was required to do those things to obtain the city's approval and the building permits; is that correct?

A Yes.

Q I'm going to refer to those collectively from this point going forward as exactions, if that's okay with you, so that we are on the same –

MR. KALLAS: I object to the use of that term, Your Honor. That's a term for the Court.

THE COURT: Sustained.

MR. SANDBERG: Your Honor, I'm merely using the same definition that the Fort Worth Court of Appeals as well as the Texas Supreme Court used, as I – while the Court will make a legal determination, the definition is what the definition is, and I just want to have something I can collectively refer to them as.

MR. KALLAS: There is no – the term of exaction implies a certain legal determination, Your Honor, that attributes certain analogies, and that' for the Court to make. Assuming he uses the

term exaction here will muddle the record as far as what we're talking about.

THE COURT: Sustain the objection.

Q (By Mr. Sandberg) I'll refer to the – those as the items. Is that clear? Is that okay with you?

A Well, I would refer to them as requirements of the City of Keller, development requirements of the City of Keller.

Q Okay, I'll refer to them as the city's requirements.

A Okay.

Q Okay. The City of Keller did not make any kind of individualized determination of the city's requirements as it related to Rolling Wood when it imposed those requirements; is that correct?

A They were the general requirements for the City of Keller.

Q They did not make any individualized determinations as it related to Rolling Wood; is that correct? That's my question, sir.

A Ask it on more time and I'll try to answer.

Q For the city's requirement, the city did not make nay individualized determination of Rolling Wood's impact when the city imposed the city's requirements; is that correct?

A That's correct.

Q Thank you. Are you – Have you heard of the Flower Mound opinions?

A I know a very little about it.

Q Okay. You understand that the Texas Supreme Court issued an opinion, as well as the

Fort Worth Court of Appeals, as it relates to the City of Flower Mound case; is that correct?

A I tell you, I don't – I really do not know any specifics about the case in detail or the decisions.

Q Okay. Is it your understanding that an individualized determination was required by the Texas Supreme Court as well as the Fort Worth Court of Appeals?

MR. KALLAS: Objection, Your Honor. He's not a lawyer. He didn't read those cases. He doesn't know what the law requires.

THE COURT: He can answer the question. Overruled.

THE WITNESS: I don't know.

Q (By Mr. Sandberg) Okay. Do you understand that if the cities, in making these

requirements, whether they do it by what is labeled as a zoning or an ordinance or a regulation or a handkerchief or a napkin, if the cities' requirements do not meet the Texas Supreme Court's requirements, okay, those requirements are improper and Rischon is entitled to compensation?

MR. KALLAS: Objection, Your Honor. That calls for a legal conclusion.

THE COURT: Overruled.

THE WITNESS: I'm not qualified to answer that.

Q (By Mr. Sandberg) Let's move on, sir.

I would like to talk to you about some of the fees specifically. Okay? I would like to talk about the roadway fee, I would like to talk about the parks fee, I would like to talk about the sidewalk fee.

Now, the purpose of all three of these fees was to generate revenue for funding or recouping the cost of capital improvements; is that correct?

A In the base – as far as the roadway impact fees or the other impact fees, those are specifically related to specific capital improvement projects within, in some cases, specific areas of town.

MR. SANDBERG: Objection, nonresponsive.

THE COURT: Overruled.

Q (By Mr. Sandberg) Is the roadway fee a charge or assessment – excuse me, a charge or assessment to generate

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(2)

No. 08-291

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

RISCHON DEVELOPMENT CORPORATION,

Petitioner,

v.

CITY OF KELLER, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS AT FORT WORTH, TEXAS

BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

The United States Supreme Court lacks jurisdiction over this proceeding under 28 U.S.C. § 1257(a) because Rischon failed to raise or preserve any rights under the United States Constitution. As noted by the Fort Worth Court of Appeals:

> Although Rischon contends in its first and second issue statements that it established a taking "under federal law," nowhere in its brief does it cite or even mention the federal constitution; nor did it allege a taking under the federal constitution in its trial court pleadings. And in a trial court brief, Rischon specifically stated, "[W]e are in fact litigating based upon the Texas Constitution . . . ." Therefore, we construe Rischon's claims to allege a taking under the Texas constitution only.

Rischon Dev. Corp. v. City of Keller, 242 S.W.3d 161, 167 n.2 (Tex. App.—Fort Worth 2007, pet. denied). Quite simply, Rischon never pursued claims under the United States Constitution and none of the state courts rendered any judgment or opinion on any question of federal law. The Fifth and Fourteenth Amendments of the United States Constitution are conspicuously absent from the trial and appellate pleadings filed by Rischon prior to its petition for writ of certiorari to this Court.

STATEMENT OF THE CASE

This inverse condemnation case was decided under the Texas Constitution's provision that "[n]o person's property shall be taken . . . unless by the consent of such person." TEX. CONST. art. I, § 17. Rischon attempts for the first time at this stage to make this a "federal case." Rischon, who desired to develop a 19 acre tract within the City of Keller, Texas, brought this suit challenging the application of the City's development regulations under Texas law. The trial court and Court of Appeals determined that Rischon consented to the regulations and therefore was not entitled to compensation. Rischon's statement of the case misstates and omits key portions of the factual and procedural record of this case.

First, Rischon states that its Fifth Amendment arguments were "discussed extensively at the trial court level" (Petition at 15) and in its appellate briefs (Petition at 15-18). This is a misstatement of the record. Rischon's live pleadings in the trial court simply challenged the City of Keller's development regulations as being "in violation of the laws of Texas and the Texas Constitution." (CR 39; Rischon's First Amended Original Petition, p. 11.) Rejecting Rischon's attempt to inject a federal question for the first time at the appellate level, the Court of Appeals stated:

> [N]owhere in its brief does it cite or even mention the federal constitution; nor did it allege a taking under the federal constitution in its trial court pleadings. And in a trial court brief, Rischon specifically stated,

> "[W]e are in fact litigating based upon the Texas Constitution. . . ."

Rischon Dev. Corp. v. City of Keller, 242 S.W.3d 161, 167 n.2 (Tex. App.—Fort Worth 2007, pet. denied). Accordingly, neither the trial court nor the Court of Appeals considered the Fifth or Fourteenth Amendment issues presented to this Court. Rather, the judgment of the trial court and opinion of the Court of Appeals rest entirely on the interpretation and application of the takings clause of the Texas Constitution.

Second, Rischon omits mentioning in its petition that the trial court made extensive factual findings that Rischon "proposed," "consented to," "did not object to," and "agreed" to each of the complained of requirements. (Pet. App. 1; Supp. CR 4; Trial Court's Findings of Fact Nos. 8, 9, 10, 11, 14, 17, 26; Concls. of Law Nos. 5, 6.) *See Rischon Dev. Corp.*, 242 S.W.3d at 163-166. Rischon chose not to challenge a single one of these factual findings of consent and agreement made by the trial court. *Rischon Dev. Corp.*, 242 S.W.3d at 166 and 169. Accordingly, the Court of Appeals concluded that "by proposing, adopting without objection, or agreeing in the Developer's Agreement without objection to all of the Rolling Wood 'requirements,' Rischon consented to those requirements." *Id.* at 169.

Rischon also omits the fact that it did not even purchase the property until *after* six of the eight so-called "requirements/exactions" had already been imposed on the property at its request or agreement. The Court of Appeals recognized that this defect could deprive Rischon of standing to challenge these particular requirements. *Rischon Dev. Corp.*, 242 S.W.3d at 166 n.1.

Finally, Rischon ignores the evidence presented to the trial court establishing that each requirement satisfied both the "essential nexus" and "rough proportionality" requirements of the very federal cases it invokes. In fact, Rischon did not even appeal the trial court's conclusion that each of the requirements substantially advanced legitimate government interests. As for the rough proportionality test of *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), the trial court heard testimony from numerous witnesses of the impact the proposed development would have on city parks, city roads, city utility lines, and public safety thereby necessitating each of the requirements essential for Rischon's development. The trial court concluded that the City cleared the constitutional hurdle set forth in this Court's decisions as adopted into the takings jurisprudence of the Texas Constitution.

The opinion of the Court of Appeals sets forth in more detail the factual and procedural background and is hereby incorporated by reference.

REASONS FOR DENYING THE PETITION

A. Rischon failed to present or preserve the federal questions raised by its petition for writ of certiorari.

The jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496 (1981). At a minimum, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. *Id.* at 501. The mere citation to federal case law in a state court petition or brief is insufficient to inform a state court that it has been presented with a claim subject to this Court's appellate jurisdiction. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987). Moreover, when the highest state court is silent on the federal question brought to this Court, this Court assumes that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here. *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).

Rischon's petition to the trial court sought determination of only the validity of the City's requirements under the Texas Constitution. (CR 39;

Rischon's First Amended Original Petition.) It is telling that the only trial court document Rischon can point to that even obliquely refers to federal constitutional precedents is the trial brief submitted to the trial court on the eve of trial. Notably, that document discusses these federal precedents in the context of attempting to convince the trial court to apply the federal *analysis* to the *Texas Constitution.* Rischon's trial brief admits as much:

> In this case, *because we are in fact litigating based upon the Texas Constitution* it would seem only logical that the standard to be imposed is that of a strict correlation between the requirements rather than a rough proportionality since the lesser guarantees of the Federal Constitution were what triggered the protections of *Dolan* and were acted upon in the *Flower Mound* case.

(Pet. App. 3, p. 7) (emphasis added); *see also Rischon Dev. Corp.*, 242 S.W.3d at 167 n.2. Moreover, the actual live pleading upon which the case was tried to the bench only alleged a "taking of value in property in violation of the requirements of the laws of Texas and the Texas Constitution." (CR 49; Rischon's First Amended Original Petition, p. 11)

Further evidence that the trial court was never presented with or considered a federal constitutional claim can be gleaned from that court's conclusions of law from which any mention of the federal constitution is missing. On the other hand, the trial court issued a

clear and unequivocal holding concerning the Texas Constitution:

> 10. The City's zoning regulations and ordinances at issue and in effect at all times material to this lawsuit and the City's actions do not constitute a taking under Texas Constitution, Article I, § 17.

(Pet. App. 1; Supp. CR 12; Concl. of Law No. 10.)

Even on appeal, though it crafted two issue statements referring to "federal law", it never cited or mentioned any provisions of the Federal Constitution, leaving the Court of Appeals to conclude that Rischon claimed a taking under the Texas Constitution only. *Rischon Dev. Corp.*, 242 S.W.3d at 167 n.2.

Accordingly, because Rischon failed to present the federal constitutional issue to the trial court for determination in the first instance, that question is not properly before this Court.

B. There is no "safe-harbor" in conflict with this Court's decisions in *Nollan* and *Dolan* created by the Fort Worth Court of Appeals' decision.

Rischon argues that the Court of Appeals' opinion below creates an "unfettered safe-harbor" within which local governments may "require consent" from developers to otherwise unconstitutional exactions. A clear reading of the trial court judgment and opinion of the Court of Appeals does not compel such a conclusion.

First, as shown above, the trial court judgment and Court of Appeals' opinion both are founded solely upon an analysis of the consent clause of article I, section 17 of the Texas Constitution: "No person's property shall be taken, damaged or destroyed for, or applied to public use without adequate compensation being made, *unless by the consent of such person.*" (emphasis added). At no point before any other court has Rischon challenged the federal constitutionality of this provision of the Texas Constitution, but Rischon implies such a challenge for the first time here.

Second, Rishcon's argument rests on a factual premise of coercion that was rejected by the trial court and Court of Appeals. The trial court made numerous explicit findings that "Rischon proposed" or "Rischon consented to" or "Rischon did not object" or "Rischon agreed" to each of the now-complained-of development obligations. (Pet. App. 1; Supp. CR 4; Findings of Fact Nos. 8, 9, 10, 11, 14, 17, 26; Concls. of Law Nos. 5, 6.) The trial court concluded that "[a]ll of the provisions of PD-938 or the Rolling Wood development were proposed or adopted by Rischon without objection." (Pet. App. 1; Supp. CR 11; Concl. of Law No. 5.) Notably, Rischon did not challenge any of these factual findings on appeal and the Court of Appeals reached the same conclusion:

> We hold that by proposing, adopting without objection, or agreeing in the Developer's Agreement without objection to all of the Rolling Wood "requirements," Rischon consented to those requirements. Therefore,

> the trial court did not err by rendering a take nothing judgment on Rischon's claims.

Rischon Dev. Corp., 242 S.W.3d at 169. Rischon omits what the trial court and Court of Appeals recognized – Rischon only complained *after* Rischon had consented to the planned development zoning ordinance and freely entered into a developer's agreement with the City. *Id.* at 168. The real question posed by Rischon's conduct and claim is not whether a city may coerce consent from a developer, but whether a city is open to after-the-fact takings challenges to zoning and development agreements it makes with developers. Here, the state courts considered the matter and determined that the City had not coerced Rischon and had acted within the bounds of the Texas Constitution. Where the property owners in *Nollan* and *Dolan* challenged the local government's development requirements from the moment they were imposed, Rischon proposed and agreed to all of the requirements until it later found them economically disadvantageous. *Compare Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828-29 (1987) and *Dolan*, 512 U.S. at 380-82 with *Rischon Dev. Corp.*, 242 S.W.3d at 168.

The opinion of the Texas appellate court does not create a "safe-harbor" or other exception to this Court's holdings in *Nollan* and *Dolan* – first because it is founded on a clause of the Texas Constitution, and second because its opinion is based upon a radically different set of facts.

Rischon cites only one case in support of its argument that the City's actions required Rischon to consent to the City's regulations: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). However, that case did not address any "consent"

issue. The only issue in *Loretto* was "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." *Id.* at 421. New York law provided that landlords could not interfere with installation of cable television facilities upon the landlord's property. *Id.* at 423. This Court held that a "permanent physical occupation authorized by government is a taking. . . ." *Id.* at 426. Accordingly, this Court held that there was a compensable taking, but emphasized that the holding applies only to physical takings:

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

Id. at 441. The *Loretto* holding is not applicable in the present case where a physical taking was not alleged and all of the requirements were agreed to or proposed by Rischon.

C. The Fort Worth Court of Appeals did not modify or reverse the trial court's conclusions of law but simply and permissibly construed the findings and conclusions to be in harmony with the judgment.

Rischon never cited or claimed the Fourteenth Amendment of the United States Constitution as a ground for relief in the state courts below. Specifically, Rischon's petition for review to the Texas Supreme Court does not cite the Fourteenth Amendment or even include the phrase "equal protection." As shown above, Rischon has not preserved this issue for consideration by this Court.

Nevertheless, Rischon charges the Court of Appeals with violating Texas appellate procedure by modifying or reversing the trial court's conclusions of law as they pertain to whether or not the City of Keller met its burden in establishing consent under the Texas Constitution. Of course, one will search in vain for any such modification or reversal in the opinion of the Court of Appeals. Rather, the Court of Appeals undertook the unsurprising task of construing the trial court's findings of fact and conclusions of law to determine whether they supported the judgment of the trial court that a violation of the Texas Constitution's takings provision had not occurred:

> While the only conclusion [of law] containing the word "consent" is the one dealing with the roadway impact fees and the park fees, the trial court also concluded that Rischon proposed or adopted without objection *all* of

> the Rolling Wood requirements. In this case, in light of the trial court's unchallenged findings of fact, "proposed or adopted without objection" is indistinguishable from "consented."

Rischon Dev. Corp., 242 S.W.3d at 169. As one might expect, such construction or interpretation of a trial court's findings and conclusions is well within the authority of a Texas intermediate appellate court. In Texas the same rules of interpretation apply in construing the meaning of a court order or judgment as in ascertaining the meaning of other written instruments. *Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404-405 (Tex. 1971). Accordingly, the entire contents of the instrument and record are to be considered and read as a whole. *Id.* at 405. More specifically, findings of fact and conclusions of law are to be construed together and if the findings of fact are susceptible of different construction, they will be construed, if possible, to be in harmony with the judgment and to support it. *Brown v. Frontier Theatres, Inc.*, 369 S.W.2d 299, 301 (Tex. 1963). It is not surprising then that the Court of Appeals in the instant case reviewed the findings and conclusions together and determined that it was possible to construe them in support of the trial court judgment that an uncompensated taking under the Texas Constitution had not occurred.

When a trial court's conclusions of law are challenged, the proper standard of review is de novo. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999); *In re Humphreys*, 88 S.W.2d 402, 404 (Tex. 1994), *cert. denied*, 513 U.S. 964 (1994). In such a review, the reviewing court exercises its own judgment, redetermines each legal issue, and will uphold the conclusions on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Suburu of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002). Incorrect conclusions of law will not require reversal if the controlling findings of fact support a correct legal theory. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). In following these standards, the Court of Appeals did not violate the Fourteenth Amendment of the United States Constitution.

CONCLUSION

A federal constitutional taking claim was not presented below. Nor does the decision below create an exception to this Court's holdings in *Nollan* and *Dolan* or violate the Equal Protection Clause of the Fourteenth Amendment in its application of Texas appellate procedure. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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